EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1460

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

LENSON HARGRAVE,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION

BENNETT H. BRUMMER
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Eleventh Judicial Circuit
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150pp

INDEX

PAGE

Excerpt of state trial transcript.....1

Sentencing Order.....5

Opinion of Florida Supreme Court (direct appeal).....8

Petition for Rehearing.....21

Motion to Strike Petition for Rehearing.....42

Order Denying Petition for Rehearing.....46

Motion for Post-conviction Relief.....47

Order Denying Motion for Post-conviction Relief.....76

Opinion of Florida Supreme Court (post-conviction appeal).....78

Order of Dismissal.....81

Petition for Writ of Habeas Corpus.....83

Brief of Respondent-Appellee (court of appeals en banc).....94

that the prosecutor's questions have been improper as to form and he has not at all reached the question of whether this juror is qualified as a matter of law to sit on a jury where there is a possibility of the imposition of capital punishment, particularly in light of what I believe to be an erroneous description of the system that the prosecutor has given to the jury.

THE COURT: I'd better make a better explanation of the process.

All right. Members of the jury, you may or may not have read of the present system under the laws of Florida concerning cases in which a defendant is accused of first degree murder. All of our present procedure is based on a fairly new law of about two years, entirely different from the procedures that had been in effect for many years prior to that time. Now, in this State, as stated by the prosecutor, we have what is known as a bifurcated trial, and that term, bifurcated-- I don't know why someone had to invent such a word, but it means a trial in two parts, and that isn't even quite true, because in many instances there's only one part to the trial. Right now, at this stage of the proceedings, we are interested in only one thing, really, in addition to

selecting a jury that is going to be impartial and fulfill their duty by listening to the instructions on the law by the court and fitting that law to the facts of the case as found by the jury. Now, inasmuch as the defendant is charged with first degree murder, the first and maybe only part of the trial will be a determination as to whether the jury finds under the law and the facts that the defendant is guilty of first degree murder. Now, in the event that the jury says not guilty, and not guilty of not only first degree murder or any form of unlawful homicide, the case is over; there won't be any second part of the trial. Now, likewise, if the jury instead of finding the defendant guilty of first degree murder were to find the defendant guilty of second degree murder or third degree murder or manslaughter, which are all to be considered also under a charge of first degree murder as what are called lesser degrees of unlawful homicide, if the jury were to find the defendant guilty of one of those lesser degrees, likewise, the trial as far as the jury is concerned would be over, because then under the law the court would impose the sentence within the limits proscribed by the law. However, in the event that the jury were to find unanimously as is required in any jury verdict on guilty or innocent,

find unanimously that the defendant is guilty of first degree murder, then we go into the second phase of the trial, because then the second phase is put into operation by law. The jury then would consider whether or not to recommend the death penalty or life imprisonment to the court.

Now, in this regard the prosecutor left out a little which I perhaps had better include for the benefit of the jury. That second part of the trial is not something upon which the jury is supposed to make a decision just on a matter of their own feelings or opinions arbitrarily. The law sets forth certain factors which the jury must take into consideration, and at that stage of the proceedings, the court supplies the jury orally and in writing with what are called aggravating circumstances which are listed in the law and mitigating circumstances, certain other circumstances that are listed in the law. The jury is asked to find which aggravating circumstances, if any, are present in the case, which mitigating circumstances, if any, are present, weigh the two, if there are some of each, and decide which outweigh the other, and then come in with a majority opinion. It does not have to be unanimous, but only a majority, a majority opinion recommending to the

court, to the judge, death penalty or life imprisonment with a minimum of twenty-five years. That is not binding on the court. The judge then makes a decision also as to these mitigating circumstances and aggravating circumstances with the help of the recommendation of the jury and the judge makes the fimal decision on the death penalty or life imprisonment.

Do any of you feel that the court--is anything that the court has said now raise any question in your mind? Do you all feel that you understand that?

It is a little complicated, but after we get used to it, it's not so complicated, but I do want to impress on you that that might not have been explained first. The decision of the jury as to life or death is not just an arbitrary one, but you are supposed to consider certain factors, and reach a recommendation based on what you find those factors to be.

Now, Mrs. Levine, is that it--Mrs. Lewis. All right. Now, Mrs. Lewis, you have stated that, I believe, that under no circumstances would you be able to vote for a death penalty. Do I understand you correctly?

MRS. LEWIS: Yes, sir.

JUL 23 1975
RICHARD P. BRINKER
CLERK

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

STATE OF FLORIDA

VS

LENSON A. HARGRAVE,
DEFENDANT.

CASE NO. 75-118 A

FINAL JUDGMENT

FILED
JUL 18 1975
RICHARD P. BRINKER
CLERK

* * * * * * *

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations a verdict was rendered, finding the defendant guilty of Murder in the First Degree.

Thereafter, the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute 921.141 (2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.

This Court, independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant LENSON A. HARGROVE, and in support thereof as required by Florida Statute 921.141 (3), submits this, its written findings upon which the sentence of death is based.

The findings of the Court are as follows:

1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141 (5), are as follows:

(d) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.

(e) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(f) That the capital felony was committed for pecuniary gain.

(h) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the

defendant deliberately leaned over the counter and shot the victim in the head.

2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.

3. That as to mitigating circumstances, the Court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree.

OR 9051 PG 475

There is no doubt that the defendant has a history of some mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect.

5. The Court is in agreement with the Jury that the aggravating circumstances in this case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, LENSON A. HARGRAVE.

WHEREFORE, IT IS,

ORDERED AND ADJUDGED as follows:

1. That you, LENSON A. HARGRAVE, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open Court, at Miami, Dade County, Florida, this 18th day of July, A.D., 1975.

Gene Williams
CIRCUIT JUDGE

NOT FINAL UNTIL TIME ?IRES TO FILE REHEARING ! ?ITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1977

LENSON HARGRAVE,	:	
Appellant,	:	
vs.	:	CASE NO. 48,135
STATE OF FLORIDA,	:	
Appellee.	:	Circuit Court Case No. 75-118A

Opinion filed June 30, 1978

An Appeal from the Circuit Court in and for Dade County, Gene Williams, Judge

Bennett H. Brummer, Public Defender; and Paul Morris, Assistant Public Defender, Miami, Florida, for Appellant

Robert L. Shevin, Attorney General; and Carolyn M. Snurkowski, Assistant Attorney General, Tallahassee, Florida, for Appellee

PER CURIAM.

This cause is before us on direct appeal from a conviction of murder in the first degree and a sentence of death imposed by the Circuit Court for Dade County, Florida. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(1), Florida Constitution.

In the early evening of May 19, 1974, appellant committed a robbery at a U-Tote-M Store in Miami. In a statement which appellant later gave to police officers, he described what transpired at the

scene of the crime. When appellant entered the store, only the clerk was present. Appellant announced his intention to rob the store and ordered the clerk to relinquish the money in the cash register. The clerk's attempt to comply proved futile when the register jammed. His demand not met, appellant shot the employee twice in the chest. He then endeavored to open the cash register himself but was unable to do so. Thereupon, a customer walked in. Appellant diverted him without arousing suspicion. When the customer exited, appellant proceeded to shoot his victim for the third time. Appellant later claimed that he fired the third shot from a fear of being apprehended.

After the killing, at a nearby parking lot, appellant met a friend, Lawrence Karge, who had previously been employed at the U-Tote-M Store in which the robbery and murder of the cashier occurred. Karge had planned the robbery with Hargrave and had given appellant detailed information about the store's alarm and security devices. Karge drove Hargrave home, where the appellant remained for a short time before leaving for his job as a night security guard.

Approximately seven months later, an informant named Terry Morton contacted the Miami Police Department relative to the U-Tote-M Store homicide. Both Karge and appellant, on separate occasions, had told the informant about the homicide.

Two days after receiving this information, the police placed the respective residences of Karge and Hargrave under surveillance. Shortly thereafter a vehicle which contained the two suspects was stopped. Appellant was taken to the homicide office where he waived his Miranda rights and signed a statement confessing to the killing and identifying the location of the murder weapon.

At a suppression hearing, appellant's counsel sought to prevent admission of both the inculpatory statement and the murder weapon as the fruits of an illegal arrest. The trial court found the confession voluntary. Both items were admitted into evidence. At the conclusion of the trial, the jury found Hargrave guilty of first degree murder.

At the penalty trial, testimony was received from both

state and defense witnesses which suggested that the appellant was mentally deficient, insecure, and fearful. The State also produced two witnesses--Karge's girlfriend and the informant's sister--who testified that the appellant had told each of them that he had killed someone before, and that it would not bother him to kill again.

The jury returned an advisory sentence of death. At a sentencing hearing before the judge on July 18, 1975, defense counsel moved that the court order a presentence report pursuant to Fla. R. Crim. P. 3.710. Defense counsel proffered the fact that the instant conviction was the defendant's first felony conviction. The motion was denied. The trial judge entered the following judgment imposing the death penalty.

> THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations a verdict was rendered, finding the defendant guilty of Murder in the First Degree.
>
> Thereafter, the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute 921.141 (2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.
>
> This Court, independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant LENSON A. HARGROVE,[sic] and in support thereof as required by Florida Statute 921.141 (3), submits this, its written findings upon which the sentence of death is based.
>
> The findings of the Court are as follows:
>
> 1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141 (5), are as follows:
>
> (d) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.
>
> (e) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> (f) That the capital felony was committed for pecuniary gain.
>
> (h) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the defendant deliberately leaned over the counter and shot the victim in the head.
>
> 2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.
>
> 3. That as to mitigating circumstances, the Court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree. There is no doubt that the defendant has a history of some mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect.

5. The Court is in agreement with the Jury that the aggravating circumstances in this case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, LENSON A. HARGRAVE.

WHEREFORE, IT IS,

ORDERED AND ADJUDGED as follows:

1. That you, LENSON A. HARGRAVE, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open Court, at Miami, Dade County, Florida, this 18th day of July, A.D., 1975.

/s/ GENE WILLIAMS
CIRCUIT JUDGE

81

11

On this appeal appellant urges three points for reversal. Each relates only to the sentence imposed. We restate the points in the order of our treatment of them: (i) whether the imposition and execution of the sentence of death under Section 921.141, Florida Statutes (1975), constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (ii) whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report as requested by defense counsel; and (iii) whether the trial court erred in imposing the death penalty. Before directing our attention to the specific points raised by appellant, we note that pursuant to Fla. App. Rule 6.16b. we have reviewed the evidence to determine if the interests of justice require a new trial. We conclude that the verdict and the judgment of guilt do not fail for insufficiency of the evidence. Implicit in this determination is our concurrence in the ruling by the trial court upon the motion to suppress.

With respect to the first issue raised, this Court's decision in State v. Dixon, 283 So.2d 1 (Fla. 1973), and the decision of the United States Supreme Court in Proffitt v. Florida, 96 S.Ct. 2960 (1976), are dispositive.

To the same extent, our decision in Thompson v. State, 328 So.2d 1 (Fla. 1976), determines adversely to appellant his assertion that the trial court was required by Fla. R. Crim. P. 3.710 to request a presentence investigation before sentencing Hargrave. In Thompson this Court concluded, essentially, that upon return of a verdict of guilty in a first degree murder case the discretion of the trial judge is limited to two alternatives, i.e., death or life imprisonment. Probation is not a sentence alternative and, therefore, the second sentence of Fla. R. Crim. P. 3.710 is inapplicable in a death case. The import of the mandatory provisions of Rule 3.710 is made clear by the fact that it exempts the necessity for a presentence investigation report for first felony offenders and those under age 18 where probation has already been determined by the judge to be the appropriate sentence. Furthermore, that the failure of the trial court

to order an investigation was not prejudicial to appellant is apparent from the face of the sentencing judgment. The trial court did not find as an aggravating circumstance that appellant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to another person. Rather the trial court found in mitigation that although there was some evidence of prior criminal activity on the part of the defendant, there were no prior convictions "so that it must fairly be said that the defendant has no significant history of criminal activity."

We come now to that part of our function of review under this State's death statute which is different from the scope of this Court's review in all other proceedings. We are mandated by Section 921.141(4), Florida Statutes (1975), automatically to review not only the judgment of conviction, but also the sentence of death. As pointed out in Proffitt v. Florida, supra, the final review of sentence in this Court supplies the channeled discretion and deliberation necessary to avert the constitutional deficiencies condemned in Furman v. Georgia, 408 U.S. 238 (1972). However, this Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of them from their proper functions prescribed by Section 921.141, Florida Statutes (1975), or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great. State v. Dixon, supra.

In the instant case appellant maintains there has been just such a departure by the trial judge in (i) finding two aggravating circumstances arising out of the single act of attempted robbery (those set forth in Section 921.141(5)(d) and (f), Florida Statutes [1975]); (ii) finding that the capital felony was especially heinous, atrocious, or cruel; and (iii) failing to find the existence of three mitigating circumstances disclosed by the evidence. The asserted mitigating circumstances are: (a) Section 921.141(6)(b)--defendant was under an extreme mental or emotional

disturbance; (b) Section 921.141(6)(f)--the defendant's capacity to conform his conduct to the requirements of law or appreciate the criminality of his act was substantially impaired; and (c) Section 921.141(6)(e)--defendant was substantially dominated by another person.

We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1976), condemns the doubling up of the aggravating circumstance of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Appellant questions the trial court's finding of one of those additional aggravating circumstances when he states that it is improper under several of our earlier decisions to characterize this capital felony as especially heinous, atrocious, or cruel. The trial judge made this finding predicated upon the defendant's act of deliberately shooting the victim in the head after he had already rendered him helpless by shooting him twice in the chest. In more common terms, the appellant in a calculated fashion "executed" the victim to avoid later identification. A short colloquy from the appellant's inculpatory statement is instructive on this point:

DETECTIVE MAJOR: "When you shot the clerk the third time, did you intend to kill him?"

THE DEFENDANT: "Yes, I did."

DETECTIVE MAJOR: "Why did you want to kill the clerk?"

THE DEFENDANT: "Because I was scared, and I was aggravated."

DETECTIVE MAJOR: "Why were you scared?"

THE DEFENDANT: "I was afraid I was going to get caught."

To this may be added the testimony of Karge's girlfriend and Morton's sister who stated that appellant had told each of them that he had killed someone before, and it would not bother him to kill again. The sum of all this evidence justifies a finding that the appellant's act of firing the third shot into the head of the victim was "extremely wicked or shockingly evil." See Alford v. State, 307 So.2d 433, 444 (Fla. 1975); State v. Dixon, supra.

Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. The trial judge conscientiously assessed the testimony of the experts and found that although there was "some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired." (Emphasis supplied) The trial judge further observed that appellant is of average intelligence or possibly slightly less than average intelligence. It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.

The proposition that appellant was under the domination of Karge is in the same posture. Although the defense psychiatrist offered evidence that Hargrave could be dominated, and although appellant's mother testified that her son was dominated by Karge, the State's psychologist, who tested both Hargrave and Karge,

concluded that appellant "certainly played the dominant role." Clearly the jury and the judge who heard the testimony resolved the conflict against the appellant.

In the performance of our constitutional duty, we have reviewed the same testimony and evidence upon which the trial judge and jury based their conclusions. We cannot say that the judgment reached by them is at material variance with our interpretation of the evidence, nor is it contrary to law. Accordingly, the judgment of conviction and the sentence of death are hereby affirmed.

It is so ordered.

OVERTON, C.J., ADKINS, ENGLAND and SUNDBERG, JJ., Concur
BOYD, J., Concurs in part and dissents in part with an opinion
HATCHETT, J., Concurs in part and dissents in part with an opinion

BOYD, J., Concurring in part and dissenting in part.

I concur in the majority opinion affirming appellant's guilt. The aggravating circumstances found by the trial court are supported by evidence in the record.

As to mitigating circumstances, the trial judge found two: (a) Hargrave's youth at the time of the crime (he was eighteen), Section 921.141(6)(g), and (b), no significant history of prior criminal activity, Section 921.141(6)(a). As recognized by the majority, there might be added, since there is competent evidence of them in the record, two other mitigating circumstances: that Hargrave's appreciation of the criminality of his conduct was substantially impaired, Section 921.141(6)(f), and that he was under the substantial domination of another person, Section 921.141(6)(e).

In my opinion the quality of the two mitigating circumstances measured against the aggravating circumstances tips the sentencing scale in favor of life. The balance is more clearly in favor of life if the two mitigating circumstances not found by the trial judge,[1] but which have some support in the record, are considered.

I would reduce the sentence to life imprisonment without eligibility for parole for twenty-five years.

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[1] Even the trial judge had second thoughts about the "substantial impairment" circumstance. See Finding No. 4, p. 3, of the majority opinion.

HATCHETT, J., concurring in part and dissenting in part

I concur in the conviction but agree with appellant that the trial judge committed error in sentencing him without benefit of a presentence investigation report and would return the case to the trial court for resentencing.

Florida Rule of Criminal Procedure 3.710 provides:

> In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18, until after such investigation has first been made and the recommendations of the Commission received and considered by the sentencing judge.

The rule clearly requires a judge to order a presentence investigation report in all cases where a defendant has not previously been convicted of a felony. Harden v. State, 290 So.2d 551 (Fla. 1st DCA 1974); Mitchum v. State, 292 So.2d 620 (Fla. 1st DCA 1974); Still v. State, 296 So.2d 67 (Fla. 1st DCA 1974); Nordone v. State, 307 So.2d 907 (Fla. 3rd DCA 1975); Lopes v. State, 309 So.2d 591 (Fla. 2nd DCA 1975); Buckles v. State, 310 So.2d 748 (Fla. 1st DCA 1975); Grubbs v. State, 311 So.2d 411 (Fla. 2nd DCA 1975); Davenport v. State, 317 So.2d 851 (Fla. 1st DCA 1975); Beverly v. State, 330 So.2d 527 (Fla. 1st DCA 1976). The record shows that appellant had no prior felony convictions. He was thus entitled to the benefit of a presentence investigation.

Relying on Thompson v. State, supra, the majority holds that once the jury returns a verdict of first degree murder the trial court is exempt from the mandatory presentence requirements of the rule. The court in Thompson based its decision on the committee note following the rule:

> The rule provides for the utilization of a presentence report as part of the sentencing process. While use of the report is discretionary in all cases, it is mandatory in two instances, the sentencing of a first felony offender and of a defendant under 18 years of age. Of course, no report is necessary where the specific sentence is mandatory, e. g., the sentence

> of death or life imprisonment in a verdict of first degree murder. (emphasis added)

This comment was written in 1972, prior to Furman v. Georgia, 408 U.S. 238 (1972) and prior to enactment of Section 921.141, Florida Statutes (1973). In 1972, the sentence of death in a capital case was, as the comment states, mandatory in the absence of a recommendation of mercy by the jury.* In cases in which the jury recommended mercy, life imprisonment was mandatory. Our present capital punishment scheme places in the trial judge discretion he did not have at the time the rule was promulgated. The comment based on the old statute is no longer valid.

The majority holds "probation is not a sentence alternative, and therefore the second sentence of Fla. R. Crim. P. 3.710 is inapplicable in a death case." The rule itself is not limited to cases in which probation is an alternative. It does not dictate how many or what kind of sentencing alternatives the trial judge must have. It speaks only in terms of "discretion as to what sentence may be imposed." Florida judges now have discretion (reasonable and controlled) as to what sentence may be imposed in a capital case. State v. Dixon, 283 So.2d 1 (1973). This is all that is required to trigger the rule. We so held in Swan v. State, 322 So.2d 485 (Fla. 1975) at 488:

> P.S.I. reports are provided for in Fla. R. Cr. P. 3.710. Rule 3.710 vests the trial court with the discretionary power to request a P.S.I. report in cases wherein the trial court possessed discretion as to the imposition of sentence. Section 921.141, Florida Statutes, vests the trial court with the limited discretion to impose either the death penalty or life imprisonment even if the jury recommends to the contrary. Thus, the discretionary nature of Section 921.141 brings it within the ambit of Rule 3.710.

The position taken by the majority, in its reliance on Thompson, suggesting that there is no sentencing discretion left in the trial judge raises serious questions concerning

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* Section 921.141, Fla. Stat. (1971) states in pertinent part:
(1) Recommendation to mercy.--A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by the jury. When the verdict includes a recommendation to mercy by the jury, the court shall sentence the defendant to life imprisonment.

the constitutionality of our present statute. Woodson v. North Carolina, 428 U.S. 280 (1976). Thompson should be overruled, not followed, in order to prevent any doubt as to the constitutionality of our statute.

In imposing sentence in a capital case, the fundamental respect of humanity underlying the Eighth Amendment requires the trial judge to take into consideration the character and record of the defendant as well as the offense for which he was convicted. Woodson v. North Carolina, supra. Practically speaking, at a time when state attorneys are seeking the means to pay witness fees for witnesses to travel from one county to another where there has been a change of venue, when public defenders are hard pressed to get funds for depositions, it is unrealistic to believe that a defendant facing sentence without the benefit of presentence investigation reports will be able to present to the sentencing judge out of state school reports, health records, or other favorable information regarding his character and record.

The rule as construed by the majority requires a presentence investigation report for all offenders under 18 years of age or convicted of a first felony offense, except those convicted of first degree murder. If presentence investigation reports are to be mandatory for anyone, surely they should be mandatory where one faces the ultimate penalty.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 48,135

LENSON ALFRED HARGRAVE,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

PETITION FOR REHEARING

The appellant requests that this Court grant rehearing in this cause.

1. On June 30, 1978 this Court filed a split (4-2) opinion affirming the appellant's conviction and sentence of death.

2. On July 12, 1978 counsel for the appellant filed a Motion to Withdraw Opinion and for Leave to File Brief and a Motion to Stay Time for Filing Petition for Rehearing Pending Ruling on Motion to Withdraw Opinion.

3. On July 17, 1978, upon consideration of the latter motion, this Court ordered that the "Petition for Rehearing is extended until disposition of Motion to Withdraw or August 7, 1978, whichever occurs first."

4. This petition for rehearing is being filed to comply with the deadline. However, counsel for the appellant submits that withdrawal of the opinion is the appropriate action to be taken by this Court for the reasons set forth in the Motion to Withdraw and thus renews said Motion.

5. In the event the Motion to Withdraw is not granted, the following grounds are presented in support of this petition for rehearing.

I.

THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONALLY LIMITS CONSIDERATION OF MITIGATING CIRCUMSTANCES.

In promulgating the Florida death penalty statute,[1] the Florida Legislature assumed that mitigating-circumstances would have to be limited in order to comply with the ruling in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that unbridled jury discretion to impose or recommend a death sentence was constitutionally prohibited. This legislative intent was relied upon by this Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976). Cooper held that the trial judge had properly excluded non-statutory mitigating evidence concerning: Cooper's employment, the co-defendant's reputation for violence and Cooper's attempts to avoid the co-defendant. The exclusion of the evidence in mitigation of the death sentence comported with the intent of the Florida Legislature:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).[7]

[7] The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6): (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist . . . ." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

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[1] Section 921.141, Florida Statutes (1972).

Cooper v. State, supra at 1139. (The continuing vitality of Cooper is evidenced by the opinion filed in this cause wherein the majority concluded that the defendant's psychological deficiencies did not provide "a sound basis for establishment of the statutory mitigating circumstances." Slip opinion at 8.)

The same legislative intent pervaded the Ohio death penalty statute which limited defendants to statutorily enumerated mitigating circumstances. That limitation led the Court in Lockett v. Ohio, ___ U.S. __ (1978), to hold the Ohio statute unconstitutional as violative of the Eighth and Fourteenth Amendments to the Constitution of the United States. Noting that the Ohio Legislature limited the mitigating circumstances in response to Furman,[2] the plurality held:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Rights and Fourteenth Amendments.[3]
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> * * *
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> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendment. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.[4]

Quite clearly, the Florida Legislature has precluded consideration of relevant mitigating circumstances[5] by limiting

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[2] Lockett v. Ohio, supra, n. 7.

[3] 98 S.Ct. at 2965.

[4] Ibid.

[5] Obviously relevant mitigating circumstances such as prospects for rehabilitation, employment background, life sentences imposed in similar cases, lack of premeditation, familial responsibility, military background, recognition of guilt, are not listed in the Florida death penalty statute.

defendants to those circumstances listed in Section 921.141(6)(a)-(g).[6]

Thus, the Florida death penalty statute suffers from the same constitutional infirmities as the Ohio statute. Accordingly, rehearing should be granted and the sentence of death reversed and reduced to life pursuant to § 775.082(2), Florida Statutes.

II.

THE FLORIDA DEATH PENALTY STATUTE WAS UNCONSTITUTIONALLY APPLIED AT THE SENTENCING PROCEEDINGS.

At the commencement of the advisory sentencing proceeding, the jury was impermissibly instructed[7] that its consideration of mitigating circumstances was limited to those enumerated in the death penalty statute, even though the jury had heard (and was about to hear) evidence of mitigating

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[6] In upholding the Florida death penalty statute in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court of the United States mistakenly assumed that Florida defendants would not be so limited. The Court so stated in Lockett, 98 S.Ct. at 2965-2966.

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.

[7] R. 984. The lack of objection to the instructions does not bar review of the instructions. In Terminiello v. Chicago, 337 U.S. 1, 3-5, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) and Stromberg v. California, 283 U.S. 359, 363-365 (1931), jury instructions purporting to construe a state statute permitted conviction upon grounds that would be federally unconstitutional (alternatively with other grounds that would be constitutional). In neither case did defense counsel object to the instructions; rather, in each case, a general attack was made on the validity of the entire statute under the federal constitution, as is the case here. (R. 473). In both cases, the upholding of the federal constitutional contentions resulted in the overturning of the convictions, notwithstanding the lack of objections to the instructions.

Note also the general rule of O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), that federal constitutional claims cannot be waived by failing to raise them prior to the United States Supreme Court decision (here, Lockett v. Ohio) which announces their very existence.

circumstances not listed in the statute.[8] The jury was given these erroneous instructions in writing upon the conclusion of the advisory sentencing proceeding. (R. 985).

Moreover, the trial judge himself limited his consideration of mitigating circumstances to those listed in the statute. He stated that he could not "go outside of" the enumerated mitigating circumstances to which he had restricted the jury. (R. 1091). The trial court felt bound by the statutory "standards" which were legislatively promulgated, in his opinion, "to eliminate as much as possible the individualistic characteristics and personalities of various defendants. . . ." (R. 1105). Thus, the trial court's sentencing order, regarding mitigating circumstances, is limited to a discussion of the statutory circumstances only. (R. 1108-1110, 1224-5).

The trial court's blatant disregard for the individual characteristics of the defendant resoundingly clashes with the holdings of Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). These decisions, which require individualized sentencing in capital cases, led to the following rule enunciated in Lockett v. Ohio, supra:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest

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[8] The jury was instructed that the advisory sentence was to be based upon evidence heard while trying the guilt or innocence of the defendant as well as evidence heard at the advisory sentencin proceeding. (R. 982). Mitigating evidence adduced, such as the defendant's employment (R. 997), the defendant's lack of intelligence (R. 991), the defendant's brain damage (R. 991-2, 1005-6), the defendant's drug usage (R. 992, 1046), the defendant's sociopathic personality (R. 993, 1000, 1045), the defendant's deviant thoughts and weak ego (R. 994), the defendant's honesty and forthrightness (R. 999, 1048), the defendant's parents' desires to prevent the defendant from associating with the co-defendant (R. 1051), parental guidance and responsibility (R. 105 etc., could not be considered by the jury because of the limiting instructions.

> kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands but public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques--probation, parole, work furloughs, to name a few--and various post conviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

98 S.Ct. at 2965.

In the case at bar, the defendant was not afforded individualized consideration by either the jury or the judge. As such, the death sentence in this case lacks "the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. at 305 (1976), and impermissibly conflicts with the Eighth Amendment rule in Lockett which was designed to assure the requisite reliability by averting "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 98 S.Ct. at 2965. Hargrave's sentence of death cannot stand.

III.

A NEW SENTENCING HEARING IS REQUIRED PURSUANT TO ELLEDGE v. STATE, 346 So.2d 998 (Fla. 1977).

Elledge v. State, 346 So.2d 998 (Fla. 1977) announced the rule that a defendant sentenced to death is entitled to a new sentencing hearing where an aggravating circumstance has been improperly considered in the weighing process of aggravating and mitigating circumstances. The reasoning was clearly enunciated:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. See Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976).

346 So.2d at 1003. This holding was reaffirmed in Jackson v. State, ___ So.2d ___ (Fla., Case No. 48,165, March 9, 1978), discussed infra at n. 10 and Gibson v. State, 351 So.2d 948 (Fla. 1977).

In the case at bar, the impermissible aggravating factor was the finding that the capital felony was committed for pecuniary gain.[9] Consideration of this factor was impermissible pursuant to the rule announced in Provence v. State, 337 So.2d 783 (Fla. 1976), which bars the weighing of the aggravating factor of pecuniary gain, § 921.141(5)(f), where that aspect of the crime was also deemed to constitute the aggravating factor that the crime was committed while the defendant was engaged in a robbery, § 921.141(5)(d).

In the opinion filed in this case, this Court recognized that such an impermissible factor entered into the weighing process. But rather than follow the precedent of Elledge

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[9] The prosecutor argued to the jury at R. 1059-1060, and to the judge at R. 1102 that both aggravating factors (d) and (f) applied. The judge agreed in his sentencing order at R. 1223.

and afford the defendant a new sentencing hearing, this Court discounted the consideration of the impermissible factor in one sentence:

> Absent the [impermissible aggravating] circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Hargrave v. State, slip opinion at 7.

How can this possibly be true of Hargrave and not Elledge, especially where the trial court found no mitigating circumstances in his order in Elledge's case, and the trial judge in Hargrave's case found at least two? The equal protection and due process violations which result from this disparate treatment are obvious. Moreover, this type of "harmless error" approach to a capital case,[10] violates the previously discussed Lockett and Woodson Eighth Amendment rules designed to assure the requisite reliability in determining the appropriateness of the death penalty in a particular case.[11]

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[10] And by no means can one reasonably suggest that the error here is harmless "beyond a reasonable doubt," which is the applicable standard for constitutional error. Chapman v. California, 386 U.S. 18 (1967). At best, three aggravating circumstances were applicable to Hargrave. (See R. 1223-4). Two statutory mitigating circumstances were established to the satisfaction of the trial court. Evidence supporting an additional two statutory mitigating circumstances was sufficient so

> "that the jury and the judge could have resolved the evidence in favor of appellant's position, . . ."
> Slip opinion at 8.

It is impossible to ensure "beyond a reasonable doubt" that the outcome of the weighing process would not have been different absent the impermissible consideration of the pecuniary gain circumstance.

Thus, where one aggravating circumstance is treated as two in violation of Provence and even one mitigating circumstance is present, reversal is required. See Jackson v. State, ___ So.2d ___ (Fla., Case No. 48,165, March 9, 1978) where a Provence violation was not reversible error only because there were no mitigating circumstances.

[11] The Florida death penalty statute was approved due to the reliability guaranteed by its requirement that the weighing process be performed by the jury and then by the trial judge prior to the independent review by this Court. State v. Dixon, 283 So.2d 1 (Fla. 1973). The harmless error approach of this Court to Hargrave's sentence deprives this defendant of the safeguard of this initial dual-step weighing process in violation of the Equal Protection Clau

As in Elledge, at least a doubt must exist as to what weight the jury and judge gave the impermissible pecuniary gain circumstance. Ordinarily, reversal is required where there is a doubt as to whether a judgment rests upon a constitutionally unsound footing. See, e.g., Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). See also n. 10, supra. Obviously, that rule must apply with added force in death penalty cases; the taking of human life on the basis of any ambiguity as to whether constitutional requirements were observed would be manifestly intolerable. This Court has frequently asserted its "responsibility and obligation . . . to deal cautiously with judgments imposing the extreme penalty," Williams v. State, 117 So.2d 473, 476 (Fla. 1960), because "[t]here is absolute finality in an executed sentence of death," Wells v. State, 98 So.2d 795, 801 (Fla. 1957), and "errors which could make the difference between life and death can hardly be deemed harmless and trivial." Pait v. State, 112 So.2d 380, 386 (Fla. 1959). See also, Coxwell v. State, ___ So.2d ___ (Fla., Case No. 51,013, July 20, 1978).

The Eighth and Fourteenth Amendments to the Constitution of the United States and Elledge v. State, supra, require reversal for a new sentencing hearing.

IV.

THE LOWER COURT'S FINDING THAT THE MURDER OF WHICH THE DEFENDANT WAS CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY WAS IMPROPER AND MANDATES REVERSAL PURSUANT TO ELLEDGE v. STATE, SUPRA.

Section 921.141(6)(e), Florida Statutes, lists the following as an aggravating circumstance:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

In the case at bar, the trial court found this aggravating circumstance to have been applicable. (R. 12-23). This Court neither approved nor disapproved this finding. However, the finding was not applicable to the case at bar.

In Gibson v. State, 351 So.2d 948 (Fla. 1977) the trial court made the following finding regarding the inapplicability of this aggravating circumstance:

> (e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> Finding: The murder had the purpose of silencing the victims of the robbery. It was not, however, directly committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

351 So.2d at 951, n. 5. Although this Court held that the trial court in Gibson had improperly interpreted aggravating circumstances (d) and (f), the above reasoning was not held by this Court to be an erroneous interpretation of aggravating circumstance (e).

The same reasoning applies to the case sub judice. No proof beyond a reasonable doubt established that Lenson Hargrave committed the murder directly for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. At best, the state can only contend that Hargrave intended to silence the victim.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States mandates that the defendant be afforded the same application of this aggravating circumstance as was afforded the defendant in Gibson.

The improper consideration of this aggravating circumstance mandates reversal since mitigating circumstances exist. Elledge v. State, supra. See also, Jackson v. State, supra.

V.

THE LOWER COURT'S FINDING THAT THE DEFENDANT'S EMPLOYMENT WAS AN AGGRAVATING CIRCUMSTANCE WAS IMPROPER AND MANDATES REVERSAL PURSUANT TO ELLEDGE v. STATE, SUPRA.

The trial court found that although the defendant's age was a mitigating circumstance, this circumstance was offset by the fact that the defendant was "at the time of the crime, self-supporting as an adult being employed by a security company." (R. 1222).

Thus, the defendant's employment status was weighed as an aggravating circumstance. Yet, employment status is not a statutorily delineated circumstance. See § 921.141(5). Thus, its consideration was erroneous. Proffitt v. Florida, 428 U.S. at 250, n. 8 (1976); Elledge v. State, 346 So.2d 998 (Fla. 1977).

As such, the defendant is entitled to a new sentencing hearing since mitigating circumstances were found. Ibid; see also Point III, supra and the federal constitutional provisions cited therein.

VI.

THIS COURT IMPROPERLY RELIED UPON A NONSTATUTORY, IRRELEVANT CIRCUMSTANCE TO SUPPORT THE SENTENCE OF DEATH.

In Huckaby v. State, 343 So.2d 33, n. 11 (Fla. 1977) this Court held:

> The trial judge found that Huckaby had a propensity to commit rape, and therefore the very fact that he was alive would create risk of harm to many persons and menace society. This attempt to predict future conduct is without relation to any statutory aggravating circumstance and must be stricken.

This Court violated the Huckaby holding by using the following factor to support a death sentence:

> [T]he testimony of Karge's girlfriend and Morton's sister who stated that appellant had told - each of them that he had killed someone before, and it would not bother him to kill again.

Slip opinion at 8.

Whether the appellant would kill again is an irrelevant non-statutory aggravating circumstance. Huckaby v. State, supra.[12] Additionally, the reliance upon this factor suggests that this Court may have been laboring under the misconception that the defendant has committed a previous crime by having "killed someone before." Yet, the comment referred to the crime in question (R. 1033-1034, 1038-1039); the defendant has no prior criminal activity.

A re-evaluation of whether the crime was especially heinous, atrocious or cruel, without consideration of this impermissible factor, is required.

VII.

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S REQUEST FOR A PRESENTENCE INVESTIGATION AND THIS COURT'S APPROVAL OF THE DENIAL VIOLATES THE DEFENDANT'S RIGHTS TO EQUAL PROTECTION UNDER THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Presentence investigations should be accorded all defendants convicted of capital offenses. See slip opinion

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[12] Indeed, this was the precise ground raised by defense counsel in his objection to this testimony at the advisory sentencing proceeding. (R. 1029). Additionally, it should be noted that the erroneous admission of this testimony was not raised on appeal because the trial judge did not consider the testimony in holding the offense to be "especially heinous, atrocious, or cruel" (R. 1224), as this Court has.

at 11-13 (Hatchett, J., dissenting).[13] However, even if a mandatory requirement for a presentence investigation is not approved by a majority of this Court, defense counsel's requests for a presentence investigation should have been granted on equal protection, due process, and cruel and unusual punishment grounds.

The defendant, an indigent, was represented at trial by court-appointed counsel who was unable to conduct a sufficient investigation into the defendant's background:

> [Defense counsel]: We have not pursued his background, or an investigation into his background to such an extent that we can say with any degree of certainty that a PSI would not benefit him or benefit the Court, either way, in some small way, no matter how small that degree might be, it certainly couldn't harm, and I just really don't see the objection.

(R. 1091).

Obviously, had the defendant been monied, he would have had the financial means to have conducted an investigation into his background. Such a discrimination against indigent persons cannot withstand constitutional scrutiny under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the cruel and unusual punishment proscription of the Eighth Amendment to the Constitution of the United States. Proffitt v. Florida, supra; Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Shuman v. State,

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13 In the opinion filed in this case, this Court concluded that Rule 3.710, Fla.R.Crim.P. and the interpretation of the rule in Thompson v. State, 328 So.2d 1 (Fla. 1976) justify the denial of presentence investigations in capital cases. However, since a state procedural rule cannot interfere with a defendant's right to defend against the state's charges, Chambers v. Mississippi, 410 U.S. 284 (1973), it follows that Rule 3.710 cannot interfere with a defendant's fundamental right to defend against the state's desire to impose death and a defendant's right to adduce non-statutory mitigating and enumerated mitigating circumstances. "[W]hen a state procedural rule comes into conflict with a fundamental constitutional right it is clear that the state rule must yield." Braswell v. Wainwright, 463 F.2d 1148, 1154 (5th Cir. 1972). Accordingly, Rule 3.710 must yield.

358 So.2d 1333 (Fla. 1978). This discrimination also deprived the defendant of his rights to access to the courts, see Bounds v. Smith, 430 U.S. 817 (1977), and effective assistance of counsel. See United States v. Pinkney, 551 F.2d 1241, 1248-1251 (D.C. Cir. 1976).

The denial of the defendant's request for a presentence investigation in this case also interferes with the defendant's right to "proportionality review." In Proffitt v. Florida, supra, the Supreme Court of the United States stressed this Court's obligation to enforce this right:

> Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.

428 U.S. at 252.

This "proportionality review," that is, review by this Court of its decisions to ensure proportionality of death sentences imposed, cannot result in even-handed justice if some defendants are afforded investigative means and others are arbitrarily denied them. This practice can only result in the arbitrary and capricious imposition of death in violation of Furman v. Georgia, 408 U.S. 238 (1972), as this Court recognized in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

In approving Florida's death penalty statute, the Supreme Court of the United States viewed this Court's proportionality review as a protection "designed to assure that the death penalty will

not be imposed on a capriciously selected group of convicted defendants." Proffitt v. Florida, 428 U.S. at 258 (1976). This protection can not be provided the defendant where he was denied the means to present individualized sentencing information due to his indigency.

That presentence investigations are excellent sources of information relevant to the mitigating circumstances has been recognized by this Court and the Supreme Court of the United States. Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. at 252, n. 9; Gregg v. Georgia, 428 U.S. at 189, n. 37; Hargrave v. State, slip opinion at 11-13 (Hatchett, J., dissenting); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977); Swan v. State, 322 So.2d 485, 488-489 (Fla. 1975); Songer v. State, 322 So.2d 481, 484 (Fla. 1975).

Section 921.231, Florida Statutes, which governs the contents of presentence investigation reports, evidences their relevance to statutory and non-statutory mitigating circumstances:

> 921.231. Presentence investigation reports -- (1) Any Circuit Court of the state, when the defendant in a criminal felony case has been found guilty or has entered a plea of nolo contendere or guilty, shall, and in misdemeanor cases in its discretion may, refer the case to the Department of Offender Rehabilitation for investigation and recommendation. It shall be the duty of the department to make a report in writing to the Circuit Court at a specified time prior to sentencing, depending upon the circumstances of the offender and the offenses. Said report shall include:
>
> (a) A complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript, if one has been made, and, at the offender's discretion, his version and explanation of the act.
>
> (b) The offender's educational background.
>
> (c) The offender's employment background, including any military record, his present employment status, and his occupational capabilities.
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> (d) The social history of the offender, including his family relationships, marital status, interests, and related activities.

(e) The residence history of the offender.

(f) The offender's medical history and, as appropriate, a psychological or psychiatric evaluation.

(g) Information about the environments to which the offender might return or to which he could be sent should a sentence of nonincarceration or community supervision be imposed by the court.

(h) Information about any resources available to assist the offender, such as:

1. Treatment centers.
2. Residential facilities.
3. Vocational training programs.
4. Special education programs.
5. Services that may preclude or supplement commitment to the department.

(i) The views of the person preparing the report as to the offender's motivations and ambitions and an assessment of the offender's explanations for his criminal activity.

(j) An explanation of the offender's criminal record, if any, including his version and explanation of any previous offenses.

(k) A recommendation as to disposition by the court. It shall be the duty of the department to make a written determination as to the reasons for its recommendation. The department shall include an evaluation of the following factors:

1. The appropriateness or inappropriateness of community facilities, programs, or services for treatment or supervision.
2. The ability or inability of the department to provide an adequate level of supervison for the offender in the community and a statement of what constitutes an adequate level of supervision.
3. The existence of other treatment modalities which the offender could use but which do not exist at present in the community.

(2) In those instances in which a presentence investigation report has been previously compiled, the department may elect to complete a short-form report updating the above information.

(3) All information in the presentence investigation report should be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, shall bear the burden of explaining why it was not possible to verify the challenged information.

(4) The nonconfidential portion of the presentence investigation shall constitute the basic classification and evaluation document of the Department of Offender

> Rehabilitation and shall contain a recommendation to the court on the treatment program most appropriate to the diagnosed needs of the offender, based upon the offender's custody classification, rehabilitative requirements, and the utilization of treatment resources in proximity to the offender's home environment.

In its opinion in this case, this Court held that the denial of the request for the presentence investigation was not prejudicial to the defendant because "[t]he trial court did not find as an aggravating circumstance that appellant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to another person." Slip opinion at 6. This conclusion can neither be reconciled with the broad-based contents of presentence investigation reports under § 921.231, nor the United States Supreme Court decisions in Gardner, Proffitt, and Gregg, nor this Court's decisions in Gibson, Swan and Songer.[14]

Additionally, the prosecutor's argument in opposition to the defendant's request for a presentence investigation report, which the trial court accepted, was meritless:

> [Prosecutor]: Judge, just briefly, I feel that a presentence investigation, if it were going to touch upon the criteria listed in the statute, might be of some relevance. However, it does not.
>
> The Court, I believe, is bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances, and that has already been brought out before the Court and the jury, and a presentence investigation would not cover those items again, and since those are the only items which are to be considered in the passage of sentence, that is my feeling for believing that the presentence investigation would not serve any purpose, because I don't believe the Court can go outside of those criteria.

(R.1090).

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[14] Indeed, this Court's conclusion only recognizes subparagraph (1)(j) of § 921.231, totally ignoring the multitude of additional information which the statute requires to be included in presentence investigation reports.

Under Lockett, the prosecutor's argument fails since the scope of evidence in mitigation is not limited by those criteria listed in the statute.

Thus, the unconstitutional application of Florida's death penalty statute in violation of Lockett v. Ohio, supra, served not only to deprive the jury and judge of consideration of non-statutory mitigating circumstances, as previously noted, but also served to deprive the indigent defendant of a vital means of effectuating the right to adduce non-statutory mitigating circumstances.

The defendant is thereby entitled to a new sentencing hearing with the benefit of a presentence investigation.

VIII.

THE DEFENDANT'S MENTAL ILLNESS MANDATES REVERSAL OF THE DEATH SENTENCE PURSUANT TO HUCKABY V. STATE, 343 So.2d 29 (Fla. 1977)

In Huckaby, supra, this Court ordered the reduction of the defendant's death sentence to life even though the trial judge had found two applicable aggravating circumstances and no mitigating circumstances. The basis for reversal was the causal connection between the defendant's mental illness and the heinous crime he committed:

> There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted.

343 So.2d at 39.

In the case at bar, two court-appointed experts examined the defendant. One concluded that the defendant probably had brain damage (R. 1000), that the psychological tests revealed that the defendant could not respond normally to day to day situations (R. 1006-7), that the defendant's

ability to deal with life was impaired (R. 1007), and that the defendant's abnormal mind was directly responsible for his inability to conform his conduct to the law. (R. 1010).

The other court-appointed expert concluded that the defendant suffered from mental disturbances which could have resulted from his extensive drug usage (R. 1046), and that the defendant's psychological illnesses caused him to "do things without thinking about them, without reasoning." (R. 1047).

Thus, as in Huckaby: (1) the experts agreed on Hargrave's mental illness; (2) although the defense was unable to prove legal insanity, it amply showed that Hargrave's mental illness was a motivating factor in the commission of the crime; (3) there was a causal connection between the mitigating and aggravating circumstances since, assuming the crime to have been heinous or atrocious or cruel, the nature of the commission of the crime was a direct consequence of the defendant's mental illness.

The trial judge's rejection of Hargrave's mental illness is no different than the trial judge's failure to consider Huckaby's mental illness. The same reasons that compelled this Court to reduce Huckaby's sentence to life mandate reduction of Hargrave's sentence to life. In fact, Hargrave's case is more compelling than Huckaby's since two additional mitigating circumstances were established to the satisfaction of the trial court: the defendant's age and lack of prior criminal activity. In Huckaby, the trial judge found no mitigating circumstances.

Obviously, this case meets both prongs of the test announced in the Hargrave opinion for reversing a death recommendation and sentence:

> [T]his Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of

them from their proper functions prescribed by Section 921.141, Florida Statutes (1975), or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great.

Slip opinion at 6.

The trial judge materially departed from his proper function, as did the trial judge in Huckaby, by rejecting the evidence of mental illness; and in view of other decisions, particularly Huckaby, the death penalty is too great.

IX.

DEFENSE COUNSEL WAS IMPROPERLY DENIED CLOSING ARGUMENT TO THE JURY AT THE ADVISORY SENTENCING PROCEEDING.

Defense counsel objected to the closing argument procedure adopted by the trial court at the advisory sentencing hearing. The court penalized the defense for putting on testimony of the defendant's mother by allowing, as a result of the testimony, the state to present two closing arguments to the jury and placing defense counsel's argument between the two. (R. 1023, 1028). Defense counsel had suggested, as is now embodied in Rule 3.780(c), Fla.R.Crim.P., that each side be given one argument with the state presenting the first argument. (R. 1025). The denial of defense counsel's request was error.

X.

THE DEFENDANT IS ENTITLED TO A NEW TRIAL SINCE A CROSS-SECTION OF THE COMMUNITY WAS EXCLUDED FROM THE JURY VENIRE.

The defendant renews herein the arguments presented in paragraphs 2-6 in the Motion to Withdraw Opinion and for Leave to File Brief.

XI.

THE DEFENDANT IS ENTITLED TO APPELLATE REVIEW BY SEVEN JUSTICES.

The defendant renews herein the argument presented in paragraph 8 of the Motion to Withdraw Opinion and for Leave to File Brief.

WHEREFORE, for the above reasons, the appellant requests that rehearing be granted in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32304, this 4th day of August, 1978.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: Paul Morris
PAUL MORRIS
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

LENSON HARGRAVE,	:	
Appellant,	:	
vs.	:	CASE NO. 48,135
STATE OF FLORIDA,	:	CIRCUIT COURT NO. 75-118A
Appellee.	:	

: : : : : : : : : : : : : : : : : :

MOTION TO STRIKE PETITIONER'S

PETITION FOR REHEARING

COMES NOW Respondent, State of Florida, by and through its undersigned counsel and files this its motion to strike Petitioner's petition for rehearing in that it violates Fla.R. App.P. 6.17, 3.14 and the new Fla.R.App.P. 9.330, and as grounds would show:

1. Three issues were raised by Petitioner in his main brief and addressed by this Court in its rendition dated June 30, 1978. Specifically,

> "(I) Whether the imposition and execution of the sentence of death under Section 921.141, Florida Statutes (1975), constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution;
>
> (II) Whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report as requested by defense counsel; and
>
> (III) Whether the trial court erred in imposing the death penalty."(Slip opinion 5)

Fla.R.App.P. 3.14(b) states:

> "Contents of Petition. The petition for rehearing shall not assume a new ground or

position from that taken in the original arguments or briefs upon which the cause was submitted, and must be set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based."

Pursuant to Fla.R.App.P. 9.330(a) for rehearing under the new appellate rules, said rule states in part:

"* * * The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order."

A cursory review of Petitioner's petition reveals that he has failed to comply with any and all requirements of the rehearing rules. Said petition is twenty-one pages long and argues new issues not previously raised or takes a new position from the position originally taken. See Points V, VI, VIII, IX, X, and XI. In regard to Points I, II, III, IV, and VII, Petitioner's petition fails to set forth "concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based."

In Williams v. State, 113 So.2d 833 (Fla. 1959) this Court opined:

"Because of a palpable and egregious violation of Florida Appellate Rule 3.14 subd, b, 31 F.S.A. providing that petitions for rehearing 'must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based and pursuant to Florida Appellate Rule 3.14, subd. d providing for the striking of such petition for a substantial violation of any material provision of the rule,

It is ordered that said petition be and the same is hereby striken."

As the Third District Court held in Sherwood v. State, 111 So.2d 96 (Fla. 3d DCA 1959) and quoting from the First District Court's opinion in State ex rel. Joytex Realty Company v. Green, 105 So.2d 817 (Fla. 1 DCA 1958):

"The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and

> subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.
>
> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has 'overlooked and failed to consider' from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.
>
> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation." 111 So.2d at 97-98

The court noted several violations of the rule pertaining to rehearing petitions, to-wit: "* * * (1) the inclusion in the petition of a written argument with supporting citations, (2) arguing or quarreling with the court over correctness of its conclusions on the points it has considered and decided, (3) advancing new or other points or theories not previously relied on, and (4) rearguing the cause in advance of a permit from the court for such reargument.* * *." 111 So.2d at 99, and finding the petition before it in violation of the rule ordered the petition for rehearing striken.

Further this Court in English v. State, 31 Fla. 356, 12 So. 689 (Fla. 1839) and State ex rel. Russell v. Barnes, 25 Fla. 86, 5 So. 703 (Fla. 1889) concluded that rehearing should not be granted where the questions that the petition alleges to have been omitted from the consideration of the court were necessarily involved in and determined by the decision, though not in express terms in the rendition.

Respondent would respectfully submit that the briefs in this cause were filed in February 1976 and the final rendition by this Court issued June 30, 1978. Obviously, the court took under consideration all those decisions rendered by the court during the pendency of Petitioner's appeal which were applicable to the issues raised and within the scope of the court's jurisdiction. See this Court's slip opinion dated June 30, 1978.

WHEREFORE, Respondent moves this Court to strike the petition for rehearing or in the alternative strike the petition and allow Petitioner leave to file a proper petition for rehearing in compliance with the aforementioned appellate rules.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

By _____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL
Tallahassee, FL 32304
904 488 0290

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I certify that a true copy hereof has been furnished Honorable Bennett Brummer, Public Defender, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Dade County Justice Building, Miami, FL 33125, via Mail, this 10th day of August, 1978.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

OF COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

TUESDAY, FEBRUARY 6, 1979

LENSON HARGRAVE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 48,135

Circuit Court Case No. 75-118A

Upon consideration of Petition for Rehearing filed by attorney for Appellant,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied. Appellee's Motion to Strike is thereby moot.

ENGLAND, C.J., ADKINS, OVERTON, SUNDBERG and ALDERMAN, JJ., concur
BOYD and HATCHETT, JJ., dissent

Motion to Withdraw Opinion and for Leave to File Brief filed by attorney for Appellant is hereby denied.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Gene Williams, Judge
Hon. Richard P. Brinker,

Paul Morris, Esquire
Carolyn M. Snurkowski, Es

IN THE CIRCUI COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

CASE NO: 75-118A (Judge Tanksley)

THE STATE OF FLORIDA,)
Plaintiff,)
vs.) MOTION TO VACATE JUDGMENT AND SENTENCE
LENSON A. HARGRAVE,)
Defendant.)

The defendant, Lenson A. Hargrave, by and through undersigned counsel, moves this Court to vacate the judgment and death sentence in the above-styled cause, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, on the grounds that said judgment and sentence are violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, and 17 of the Constitution of the State of Florida.

THE FACTS

Defendant was charged by indictment filed January 9, 1975 with first-degree murder.[1] He was tried on July 10-11 and 14-15. The evidence adduced at trial, based entirely upon the statements of defendant, established that defendant, on May 19, 1974, entered a convenience store in Miami, intending to commit a robbery. The clerk was unable to open the cash register. Defendant shot him, attempted unsuccessfully to open the register, and then shot the clerk a second time. Defendant was arrested approximately seven

[1] Defendant was represented in initial Circuit Court proceedings by Assistant Public Defenders Linnea R. Snyder and Stephen I. Mechanic. The Public Defender was discharged as counsel prior to trial, and defendant was represented at trial by Douglas Williams and Michael Tarre as court-appointed counsel. Defendant was represented on direct appeal and in certiorari proceedings in the Supreme Court of the United States by Assistant Public Defender Paul Morris. Defendant is being represented in post-trial proceedings by current counsel.

months after the homicide, and subsequently confessed to his participation in the offense. The evidence adduced at trial further established that the robbery had been instigated and planned by Lawrence Karge, the co-defendant in this case.[2]

The jury returned a guilty verdict on July 15, 1975 and subsequently returned an advisory sentence recommending the imposition of the death sentence. On July 18, 1975, the court imposed a sentence of death, finding four aggravating circumstances applicable: that the homicide was committed during the course of an attempted robbery; that the homicide was committed for the purpose of avoiding arrest; that the homicide was committed for pecuniary gain; and that the homicide was especially heinous, atrocious and cruel. The court found as mitigating circumstances that defendant had no significant history of criminal activity and his age at the time of the crime (just short of his 19th birthday); the court, while noting that the evidence adduced at the sentencing hearing established "that the defendant has a history of some mental abnormalities which may yet be affecting (him)" and that "there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree", rejected these factors as mitigating circumstances.

A timely appeal was taken from the judgment and sentence to the Supreme Court of Florida. The Court issued its decision on June 30, 1978 and denied a timely filed petition for rehearing on February 6, 1979. A petition for writ of certiorari was subsequently filed in the Supreme Court of the United States: the petition was denied on October 15, 1979 and a timely filed petition for rehearing was denied on December 3, 1979.

The Florida Cabinet, sitting as the Board of Executive Clemency, heard clemency arguments on September 12, 1980. The

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[2] The facts in this motion are excerpted from the opinion of the Supreme Court of Florida in this case, which is reported at 366 So.2d 1 and is included in the attached appendix.

Governor signed a death warrant for defendant on September 17, 1980; execution is scheduled for October 8, 1980 at 8:30 A.M.. No prior post-conviction motions have been filed in this cause.

GROUNDS FOR RELIEF

I

THE PROSECUTOR AND THE TRIAL COURT IMPROPERLY COMMENTED UPON THE SILENCE OF DEFENDANT AT TRIAL, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND RULE 3.250 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Comments which infringed upon the absolute right of defendant to remain silent at trial occurred at several points during the course of the trial proceedings:

1) voir dire: During jury selection, counsel for defendant inquired of the jurors regarding their ability to fairly try the case if defendant did not testify (R. 360-63).[3] One juror stated his opinion that an accused should testify (R. 362-63), and counsel for defendant requested an excusal for cause (R. 363). The prosecutor requested and was granted an opportunity to question the juror (R. 363-64), and the following then transpired:

> Mr. Goldstein (Assistant State Attorney): Mr. Tucker, we can all understand that you might want to hear something from the defendant. Maybe you will hear the State's evidence and you might feel in your own mind, "Well, I would like to hear what the defendant has to say about that." Okay. We can understand that, but the court is going to --
>
> Mr. Tarry (Co-counsel for defendant): Excuse me. I must object to that comment, because I don't believe I could understand that.
>
> Mr. Goldstein: I believe I said --
>
> Mr. Tarry: I would strenuously object.
>
> The Court: Sustained. The jury will disregard the last statement of the prosecutor.
>
> Mr. Tarry: And I would reserve my right to make certain motions later on.
>
> Mr. Goldstein: You might feel at the close of the case that you would want the defendant to

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[3] Relevant excerpts from the trial transcript are included in the second portion of the appendix to this motion. Page references are to the original pagination.

> make some statement; however, i. the judge tells you at the close of the case that the defendant does not have to say anything, he does not have to take the stand, and if the judge-- (R. 364-65).

Counsel renewed his objection and moved for a mistrial (R. 365-66). The prosecutor responded that he had merely been referring to the instruction which the court would give on this matter (R. 366). The court properly noted that the instruction on an accused not testifying is only given, under Florida law, if the accused requests it, and counsel for defendant stated that it had not been his intention to do so (R. 366).[4] The court stated that it was "going to try to cure it" (R. 368), and over objection of counsel instructed the jurors that the burden remained upon the prosecution to prove defendant guilty (R. 369-72). The juror in question, Mr. Tucker, then responded:

> . . . If the defendant is going to sit there in living image and not say anything, well, (it) don't seem like a trial. He is guilty from -- (R. 373).

Counsel renewed the motion for mistrial and requested the court to strike the jury panel (R. 374-75). The motion was denied (R. 376-77). The court then excused the particular juror, stating, "I wish now that I had granted the motion then instead of going to try and make it better and let the prosecutor go into it." (R. 378).

2) trial proceedings: During redirect examination of Terry Morton, a prosecution witness who had testified to inculpatory statements of defendant prior to his arrest, the prosecutor inquired regarding the statements of defendant, and counsel for defendant objected on the ground that this subject had not been covered on cross-examination (R. 737). The prosecutor responded, "This is an area Lenson Hargrave ***brought up." (R. 737). Counsel for defendant moved for a mistrial (R. 738-39). The prosecutor stated in response that he had been referring to the statements of defendant (R. 739-40). The motion for mistrial was denied (R. 740).

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[4] The instruction was not requested and was not given by the court.

3) comments by the court: During his cross-examination of Detective Major, the lead investigator, counsel for defendant sought to establish that criminal charges against Terry Morton had been held in abeyance pending his trial testimony (R. 798). Objections to this questioning were sustained (R. 798-800). Counsel then inquired regarding the personal knowledge of the officer, and the following transpired:

> Q. Do you know it to be a fact, Detective Major, that as of May of 1975, there had been a delay in the disposing of criminal charges against --
> Mr. Goldstein: Objection, Your Honor.
> Mr. Williams (Co-counsel for defendant): I'm asking for his factual knowledge.
> Mr. Goldstein: There is any number of reasons why cases get tried and do not get tried and get delayed.
> Mr. Williams: I would be happy to have it explained.
>
> * * *
>
> The Court: These are things you can show through your own witnesses, really. (R. 800-01).

Counsel objected to this comment and reserved his right to move for a mistrial (R. 801). He subsequently moved for a mistrial (R. 841). The court responded that its comment had been that "if you want to bring all these things out, you're going to have to call witnesses", and denied the motion (R. 842).

4) closing argument: In his closing argument, the prosecutor made reference to the opening statement of counsel for defendant, and argued that counsel had represented that certain facts would be adduced; he stated that these facts had not been established (R. 926). He continued this argument:

> It is true that you are not permitted to go outside the evidence that you heard, except to the extent that you are to apply your common sense in interpreting this evidence, but you are not to go outside this evidence and speculate as to what other people might know or why didn't we hear from those people, and what would they have said had they been called.
> You're not permitted to do that.
> I might remind you, at this time, Mr. Williams has the same subpoena power the State has. (R. 927-28).

Counsel objected to this comment and reserved his right to move for a mistrial (R. 928). A subsequent motion for mistrial was

denied by the court (R 948-49).

It is fundamental that comments upon the silence of an accused at trial, either from the prosecution or the court, violate the Fifth Amendment privilege against self-incrimination. Chapman v. California, 386 U.S. 18 (1967); Griffin v. California, 380 U.S. 609 (1965). "(I)t is the fact of comment rather than the source of comment that effects denial of the right to remain silent." Sublette v. State, 365 So.2d 775, 778 (Fla. 3d DCA 1978). In Florida, such comment is prohibited, whether it be direct or indirect, and any comment which may be interpreted as referring to the silence of an accused is improper regardless of the intent with which it was made and regardless of the susceptibility of the comment to a different construction. See, e.g. Trafficante v. State, 92 So.2d 811, 814 (Fla. 1957); Smith v. State, 344 So.2d 915, 920 (Fla. 1st DCA 1977); Mathis v. State, 267 So.2d 846, 848 (Fla. 4th DCA 1972); Jones v. State, 260 So.2d 279, 281 (Fla. 3d DCA 1972). A comment which can be interpreted as a reference to the silence of an accused is improper even if it was "innocently or inadvertently made" and regardless of "whether any harm was actually intended." Singleton v. State, 183 So.2d 245, 251 (Fla. 2d DCA 1966). Thus, comments by a prosecutor which, on their face, appear to be neutral recitations of the right of an accused to remain silent or to the subpoena power enjoyed by an accused, or comments on the right of an accused to produce witnesses, are forbidden. See, e.g. Carter v. State, 199 So.2d 324 (Fla. 2d DCA 1967); Tolliver v. State, 133 So.2d 565 (Fla. 3d DCA 1961).

Such comments are per se prejudicial, are not subject to the harmless error doctrine, and cannot be remedied by curative instructions. See David v. State, 369 So.2d 943 (Fla. 1979); Shannon v. State 335 So.2d 5 (Fla. 1976); Way v. State, 67 So.2d 321 (Fla. 1953); Smith v. State, 358 So.2d 1137 (Fla. 3d DCA 1978); Kembro v. State, 346 So.2d 1083 (Fla. 1st DCA 1977); Young v. State, 280 So.2d 12 (Fla. 2d DCA 1973).

II

THE APPLICATION OF THE DEATH PENALTY TO DEFENDANT VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Consideration Of All Relavant Mitigating Circumstances Was Limited At Trial And On Appeal, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments.[5]

The Eighth Amendment "calls for a greater degree of reliability" in the determination of whether death is an appropriate penalty than is required in other criminal proceedings. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964 (1978). Accord Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). It thus commands an "individualized decision" to impose death, Lockett v. Ohio, supra at 2965, which contemplates a "character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). The sentencing process must provide for full consideration of the "character and record of the individual offender", and allow for full consideration of "whatever mitigating circumstances may be relevant" to that person. Lockett v. Ohio, supra at 2963. See also Roberts v. Louisiana, 431 U.S. 633, 637 (1977); Woodson v. North Carolina, supra at 304.

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5 In Songer v. State, 365 So.2d 696, 700 (Fla. 1978), the first post-Lockett decision of the Supreme Court of Florida to address the Lockett issue, the Court held that the statutory roster of mitigating circumstances is not and never was exclusive. See n. 6, infra. In 1979, Section 921.141 was amended by the Legislature to provide for the admissibility of "any matter the court deems relevant to the nature of the crime and the character of the defendant"; the amended statute moreove deletes the references to the mitigating factors "as enumerated". The legislative history of the amendment, Ch. 79-353, Laws of Florida, est lishes that it was intended to bring Section 921.141 into line with th rule announced in Lockett v. Ohio, 438 U.S. 586 (1978). Songer is in irreconcilable conflict with this legislative history and intent, whic establishes that the legislature intended the pre-1979 statute to be limited to the specific mitigating circumstances.

Thus, the sentencing statute and procedure under which defendant was sentenced was unconstitutional under Lockett. However, in light of Songer, which is binding on this Court, defendant will not advance further argument in this regard before this Court. Defendant does no waive the unconstitutionality of the statute and procedure under whic he was sentenced, nor does defendant waive any contentions that capit punishment is per se violative of the Eighth and Fourteenth Amendment and that Section 921.141 is facially unconstitutional.

Lockett establishes that the Eighth Amendment requirement of individualized sentencing is satisfied only if all possible mitigating circumstances may be brought before the sentencing authority; thus, a sentencing scheme which "prevents the sentencer from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation" is unconstitutional. 98 S.Ct. at 2965. While Section 921.141(6) is limited to specific mitigating circumstances, Songer v. State, 365 So.2d 696, 700 (Fla. 1978) establishes that this list is not exclusive and that "all relevant circumstances may be considered in mitigation." Were this not so, of course, the statute would fall under Lockett.

While the mitigating evidence under the Florida scheme may not be limited to the factors set forth in the statute, defendant in this case was deprived of an opportunity to present and have considered all relevant mitigating circumstances. This renders the death penalty unconstitutional as applied to defendant, and the death sentence imposed upon him unlawful.

Not once, but several times during the course of the advisory sentence hearing, the jury was advised that the mitigating circumstances which it could consider were limited. At the outset of the hearing, the court instructed the jury:

> During the hearing, you will receive evidence and testimony concerning aggravating or mitigating circumstances. (R. 982).

During the closing argument of the prosecutor, it was again stressed that "certain criteria have been devised" to guide the jury (R. 1058), and the prosecutor prefaced a reading of the statutory mitigating circumstances by telling the jury that it was "going to be instructed as to certain mitigating circumstances that you should look for . . . (R. 1061). The prosecutor then read the statutory roster (R. 1061-64)

Furthermore, the record establishes that all of the parties to this trial believed the mitigating circumstances to be limited to those specified in Section 921.141(6), Florida Statutes (1977). At the close of the advisory sentence proceeding, counsel for defendant requested the court to order a presentence investigation; in stating

its belief that defendant was not entitled to a presentence investigation, the court noted:

> But there is very little, if any of the ordinary presentence report that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances. (R. 1082).

At a subsequent hearing regarding the claim of defendant that a presentence report was required, the prosecutor voiced the same response:

> Mr. Goldstein: Judge, just briefly, I feel that a presentence investigation, if it were going to touch upon the criteria listed in the statute, might be of some relevance. However, it does not.
>
> The Court, I believe, is bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances, and that has already been brought out before the Court and the jury, and a presentence investigation would not cover those items again, and since those are the only items which are to be considered in the passage of sentence, that is my feeling for believeing (sic) that the presentence investigation would not serve any purpose, because I don't believe the Court can go outside of those criteria. (R. 1090).

Counsel for defendant never challenged this position -- indeed, he seemed to affirmatively accept it -- and the court expressly accepted it in denying the motion for a presentence investigation (R. 1090-92).[6]

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[6] There was no express and absolute principle of Florida law at the time of this trial which governed the admissibility of non-statutory mitigating circumstances. However, the statute itself, listing a specific roster of mitigating circumstances, certainly indicated a limitation to those circumstances. And the Supreme Court, in State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973), also used limitative language in analyzing potential mitigating circumstances:

> The most important safeguard presented in Fla.Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. . . .
>
> * * *
>
> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. §921.141(7), F.S.A. . . . .

See also Alford v. State, 307 So.2d 433, 444 (Fla. 1975). The Court arguably so held in Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, Songer v. State, supra teaches that Cooper did not so hold, and that the mitigating circumstances were never limited to those specified in the statute. 365 So.2d at 700. Accordingly, the blind acquiescence of counsel for defendant in a clearly erroneous interpretation of the law by the court and the prosecutor -- to the undeniable detriment of his client -- constitutes ineffective assistance of counsel. It is fundamental that "the delivery of effective assistance requires the attorney involved to make a reasonable investigation into the facts

Moreover, even if defendant had been permitted to have presented, see n. 6, supra, relevant non-statutory mitigating evidence, the sentencing proceeding in this case would remain constitutionally infirm due to the absence of proper instructions to the jury. As Lockett clearly establishes, merely providing the sentencing authority with relevant information is not sufficient if it cannot be appropriately considered in mitigation of the penalty. 98 S.Ct. at 2959, 2965-67. "[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment by a sentencing jury; rather, the jury must be given proper instructions to guide it in utilizing this information. Gregg v. Georgia, 428 U.S. 153, 192-95 (1976). Lockett mandates that "the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death." Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978). The absence of such instructions -- and the presence of instructions that the mitigating circumstances were limited -- renders the death-sentencing procedure in this case violative of the Eighth Amendment.

The same limitations pervade the sentencing order. In

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6 cont.
of the case and to acquaint himself with the law pertinent to the facts." Nelson v. State, 274 So.2d 256, 258 (Fla. 4th DCA 1973). Counsel must be familiar with controlling legal principles and be a "reasonably competent legal historian". Cooks v. United States, 461 F.2d 530, 532 (5th Cir. 1972). The failure of counsel to do so renders his representation ineffective.

Moreover, counsel himself admitted, at the hearing on the request for a presentence investigation that insufficient preparation had been done for the death phase of the trial:

> We have not pursued his background, or an investigation into his background to such an extent that we can say with any degree of certainty that a PSI would not benefit him or benefit the Court, either way, in some small way, no matter how small that degree may be. . . . . (R. 1091).

Thus, even if counsel had persuaded the court to allow the presentation of non-statutory mitigating circumstances and to instruct the jury to consider such evidence, the insufficient investigation into the character and background of defendant would have prohibited the full expostulation contemplated under a constitutional death penalty structure. Accordingly, the limitative rulings of the trial court and the ineffective assistance rendered defendant by his counsel deprived him of both the means and the opportunity to present the jury and the court with evidence of "whatever mitigating circumstances may (have been) relevant" -- an absolute prerequisite to a constitutionally tolerable imposition of the death penalty. Lockett v. Ohio, supra at 2963.

rejecting the applicability of two statutory mitigating circumstances, Section 921.141(6)(b) and (f), the court noted that some level of mitigating evidence had been introduced, but totally discounted it:

> That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

Thus, the court recognized that defendant was in fact impaired, but gave this fact no weight because it failed to satisfy the statutory mitigating circumstances.

And the Supreme Court, in upholding the death sentence, similarly limited its consideration of possible mitigating circumstances:

> Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. . . . Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. . . . It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances. Hargrave v. State, 366 So.2d 1, 6 (Fla. 1978)(original emphasis).

This limited approach by the Supreme Court is of particular significance in light of its rejection of the "doubling up" argument advanced on behalf of defendant, challenging the application by the court of two aggravating circumstances -- felony-murder and a homicide committed for pecuniary gain -- based upon the same facts. The Supreme Court, while recognizing the error, held it harmless because "[a]bsent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances." Id. at 5 (emphasis supplied).

Thus, at every level of the trifurcated Florida death penalty structure -- the jury, the trial court, and the Supreme Court -- defendant was denied the means and opportunity to present, and a full consideration of, all relevant mitigating circumstances. That allowin

defendant such an opportunity would have resulted in the presentation of powerful mitigating evidence cannot be questioned. See Proffer included in appendix.[7] Lockett thus requires the conclusion that the entire sentencing process in this case violated the Eighth and Fourteenth Amendments.

B. The Admission Into Evidence Of The Testimony Of A Court-Appointed Psychologist, Who Examined Defendant Prior To Trial To Determine His Competency To Stand Trial, At The Sentencing Hearing Violated The Fifth, Sixth And Fourteenth Amendments.

Prior to trial, the court appointed Dr. Robert W. Sylvester, a clinical psychologist, to examine defendant. The order directs Dr. Sylvester (and two other experts appointed by the court) to report regarding: the "mental condition of the defendant"; the capacity of the defendant to stand trial; the sanity of the defendant at the time of the offense; whether defendant should be afforded psychiatric treatment. Dr. Sylvester examined defendant on February 12, 1975. Defendant was not advised, prior to the examination, that the evidence gleaned therefrom could be introduced at the sentencing phase of the trial and that he had a right to remain silent or could terminate the interview if he so wished.

Dr. Sylvester was presented by the State at the sentencing hearing. He testified, in pertinent part, that: defendant did not suffer from a severe mental or emotional disorder; that defendant was a sociopath with a disregard for the law and for social conventions; and that defendant had been the dominant figure in the offense, rather than the co-defendant Karge (R. 987-98, 1009-10).[8]

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[7] The third section of the appendix is a proffer of the mitigating evidence which could have been presented at trial. It is a copy of a packet submitted to the Florida Cabinet prior to the clemency hearing on September 12, 1980. Included in the packet are three social and psychological evaluations of defendant and his family and additional relevant data. Due to the extreme haste with which a warrant was issued after the clemency hearing, counsel have been unable to provide a more extensive proffer; however, the materials in the proffer provide an excellent example of the type of evidence which could have been presented had defendant been afforded the full sentencing hearing contemplated under Lockett.

[8] The prejudicial effect of this testimony is patent. It was relied upon by this court (and subsequently by the Supreme Court) to reject the applicability of relevant statutory mitigating circumstances.

The admissi . of this testimony viol pd the Fifth and Sixth Amendments. In Smith v. Estelle, 602 F.2d 694, 708-09 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit ruled that an accused in a capital case may not be compelled to be examined by an expert whose testimony will be used by the State in seeking the death penalty, and that the accused must be advised, prior to such an examination, that he/she has the right to remain silent and the right to terminate the examination. See also United States v. Leonard, 609 F.2d 1163 (5th Cir. 1980). The absence of such warnings in this case renders the testimony of Dr. Sylvester inadmissible.

C. The Reliance By The Prosecutor Upon Non-Statutory Aggravating Circumstances Violates The Eighth And Fourteenth Amendments.

Section 921.141(5) specifies certain specific aggravating circumstances which may be considered in the death-sentencing process; non-statutory aggravating circumstances may not be considered in determining whether death is an appropriate sentence. E.g. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978); Riley v. State, 366 So.2d 19, 21 (Fla. 1978); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976). "The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Miller v. State, 373 So.2d 882, 885 (Fla. 1979)(citation omitted).

The prosecutor in this case violated this most basic principle, one of the key protections against the arbitrary and capricious application of death as punishment. Elledge v. State, supra at 1002-03. In his opening argument[9], the prosecutor urged the jury to recommend a death sentence based in part upon the alleged propensity of defendant to commit murder:

> . . . [B]ecause of the fact that Lenson Hargrave has boasted so frequently about his having killed somebody and about his

[9] Since defendant presented evidence at the sentencing hearing, the court allowed the State opening and closing arguments. Contrast Fla.R.Crim.P. 3.780(c).

> being able to kill again without feeling and about being able to kill again, because of all of those things, the State urges you to return a recommendation to this Court of death. (R. 1065).

The evidence upon which this argument was based had been introduced -- ostensibly -- to refute possible mitigating circumstances and not to prove an aggravating circumstance (R. 1029-31).

In his closing argument, the prosecutor reprised this theme, urging the jury to recommend death for the protection of the community:

> . . . .I submit to you that there is only one way that you can tell this Court and the people of this community that there is no place in this society for people who feel like Lenson Hargrave, people who feel that killing another human being senselessly and needlessly and viciously have any place in this society. (R. 1073-74).

The propensity of an individual to commit crimes is simply not an authorized aggravating circumstance and cannot be considered in the death-determination process. Miller v. State, supra at 885; Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977). Remarks calculated to influence the jury by inciting fears for the safety of their community are improper and prejudicial in any criminal trial. See e.g. Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). The effect of such remarks is yet more egregious in a capital case, see Grant v. State, 194 So.2d 612, 614-15 (Fla. 1967), particularly under a statute where limited aggravating circumstances are one of the key factors in the constitutionality of the penalty. State v. Dixon, supra.

D. The Failure Of The Trial Court To Properly Instruct The Jury On The Burden Of Proof At The Sentencing Hearing Violates The Fifth, Eighth And Fourteenth Amendments.

During discussions at the sentencing hearing regarding the burden of proof, the trial court commented, "I don't know if anyone has any burden of proof." (R. 1027). It further stated, "There is no burden of proof on anybody here. It's up to the jury on the whole thing." (R. 1027). At the close of the hearing, the court instructed the jury that aggravating circumstances must be proved beyond a

reasonable doubt. The Court further instructed the jury:

> Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. (R. 1074).

The court did not otherwise instruct the jury on the burden of proof.

The ultimate issue in a sentencing determination under Section 921.141 is not whether an aggravating circumstance or circumstances exist, and it is not whether, given such circumstance or circumstances, the mitigating considerations can override the assumption that death is appropriate. Rather, "[n]o defendant can be sentenced to capital punishment unless the aggravating circumstances outweigh the mitigating factors." Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

For death is not necessarily the proper punishment merely because an aggravating circumstance exists. Application of the death penalty is limited "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, supra at 7. Thus, mitigating circumstances are not mere affirmative defenses to the imposition of the death penalty -- the overriding of such circumstances is an absolute prerequisite of a valid death sentence. See Lockett v. Ohio, supra; Gregg v. Georgia, 428 U.S. 153, 197 (1976); Alvord v. State, supra. Due process of law therefore requires that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt before death may be inflicted. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).[10]

Such due process protections are of equal, if not greater

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[10] In Mullaney, the Supreme Court considered a homicide statute under which, once the State established that the killing was intentional, the element of "malice aforethought" was presumed and the accused was guilty of murder, "unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter". 421 U.S. 688, 691-92. The Court held "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Id. at 704. Mullaney thus forbids "shifting of the burden of persuasion with respect to a fact" which must be proved to support a conviction. Patterson v. New York, supra at 216.

importance in the capital sentencing process. See Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235 (1978); Gardner v. Florida, 430 U.S. 349 (1977). Mullaney is of particular application to the sentencing decision in a capital case inasmuch as the question of whether or not the killing "was committed in heat of passion" did not "come into play until the jury already has determined that the defendant is guilty and may be punished at least for manslaughter." 421 U.S. at 697. The State argued in Mullaney that the question was therefore only relevant to punishment -- not to guilt -- and that the due process requirement of proof beyond a reasonable doubt was therefore inapplicable. Id. at 697-98.

(continued on next page)

The resounding rejection of this argument by the U. S. Supreme Court is of critical significance in this case:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes. 421 U.S. 698.

Certainly, the qualitative difference between life or death in a capital case is "of greater importance than the difference between guilt or innocence for many lesser crimes."

Mullaney thus mandates the conclusion that the State must, in a capital sentencing hearing, establish beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Florida has declared that it will not execute persons except for "the most aggravated and unmitigated of most serious crimes." State v. Dixon, supra at 7. It cannot place the burden upon the defendant to prove that he or she should not be killed -- Mullaney places the burden squarely upon the State to prove that the defendant should be executed.

Section 921.141 does not affirmatively place a burden of proof upon defendant. The holding of the Court in Alvord v. State, supra clearly establishes that the burden is not to be placed upon the defendant. However, the instructions to the jury in this case could and probably would be interpreted as doing so; this establishes the due process violation. Sandstrom v. Montana, ____U S.____, 99 S.Ct. 2450 (1979); Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979).[11]

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[11] In Sandstrom, the Supreme Court considered a premeditated murder prosecution in which the defense proffered was a lack of specific inten Id. at 2453. The jury in that case was instructed that an individual i presumed to intend the ordinary consequences of his or her acts; this instruction was challenged on the ground that it impermissibly shifted the burden of proof to the defendant. Id. at 2453-54.

The Supreme Court held that "the jury may have interpreted the instruction as a direction to find intent upon the proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof". 99 S.Ct. at

E. The Court Improperly Applied Statutory Aggravating Circumstances In Sentencing Defendant To Death.

1. felony murder

Defendant was charged with premeditated first-degree murder. However, at trial, the prosecutor sought a conviction also upon the basis of felony-murder. This is proper under Florida law. Knight v. State, 338 So.2d 201, 204 (Fla. 1976). Since a specific jury verdict was not returned, it cannot be known with any certainty upon which theory the jury convicted defendant.

The court utilized felony murder as an aggravating circumstance under Section 921.141(5)(d). Its application, in a case where the prosecution sought a conviction in part upon a felony-murder theory, violates the Eighth Amendment:

> . . . . Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.
>
> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony-murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury the aggravating circumstance concerning the underlying felony. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 556-57 (1979).

2. especially heinous, atrocious or cruel

The court found the homicide in this case to be within the scope of Section 921.141(h) on the following basis:

> . . . [T]he capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor,

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11 cont.
2456 (original emphasis). The Court ruled that this would have "effectively shift[ed] the burden of persuasion" to the accused, in violation of Mullaney. Id. at 2456, 2459. The instruction in Sandstrom was accordingly held constitutionally deficient. And the same conclusion would be required even if the statute involved in such an instruction did not facially shift the burden of proof -- the critical question is what a jury could have concluded from the instructions of trial court. Hammontree v. Phelps, supra at 1379-80.

> the defendant deliberately leaned over the counter and shot the victim in the head.

This finding cannot support the application of Section 921.141(h).

That subsection establishes a potential aggravating circumstance that the homicide was "especially heinous, atrocious, or cruel." In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), the Supreme Court of Florida interpreted this subsection to include crimes which are "outrageously wicked and vile". As the Supreme Court of the United States has recently observed in passing upon the validity of a similar provision in the Georgia death penalty law:

> . . . There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759, 1765 (1980).

Thus, under Godfrey, the definitional language in Dixon is no limitation upon the application of subsection (h). Consequently, in light of that decision, the only manner in which subsection (h) can be constitutionally applied is if its application is limited to the "additional acts" of which the Supreme Court spoke in Dixon:

> . . . What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- The conscienceless or pitiless crime which is unnecessarily torturous to the victim. 283 So.2d at 9.

See also Purdy v. State, 343 So.2d 4, 6 (Fla. 1977).

Under this test, the method by which the homicide is perpetrated is key -- the "additional acts" must be the focus. Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Godfrey limitation upon subsection (h) renders its application to defendant unconstitutional.

The Supreme Court of Florida has clearly held that "[d]irecting a pistol shot straight to the head of the victim" is not an "especially heinous, atrocious, or cruel" homicide. Kampff v. State 371 So.2d 1007, 1010 (Fla. 1979). Accord Williams v. State, ____So.2d ____, Case No. 50,666 (Fla. 1980), opinion filed June 12, 1980; Downs

v. State, ___So.2d___, Case No. 58,524, (Fla 1980), opinion filed May 22, 1980; Riley v. State, 366 So.2d 19, 21 (Fla. 1978). The only "additional act" which could possibly remove this case from that rule is that the victim was "helpless" at the time of the homicide, having been shot once by defendant.

That is insufficient to establish this circumstance, under well-established Florida law. In Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979), the victim was killed during a robbery, having been shot twice by the accused; the evidence indicated that "his arms may have been in a submissive position at the time he was shot". The Supreme Court held that "there is nothing to set his execution murder 'apart from the norm of capital felonies.'" Id. at 1282. In Riley v. State, supra, three persons in a business were victims of a robbery, and were forced by the accused and an accomplice to lie on the floor; the victims were "bound, gagged, and then shot in the head." 366 So.2d at 20. Two of the victims died, while one (the son of one of the victims), survived. Id. at 21. The Supreme Court held that "[t]here was nothing atrocious (for death penalty purposes) done to the victim, however, who died instantaneously from a gunshot in the head." Id.

The victims in Riley were certainly "helpless" at the time of the homicides, and the victim in Menendez may also have been so. The fact that the victim in this case was shot more than once is of no significance for these purposes; so too was the victim in Menendez. See also Downs v. State, supra. Indeed, in Lewis v. State, supra, the victim was shot once in the chest by defendant and, as he attempted to flee, defendant "shot him several more times in the back." 377 So.2d at 646. The Supreme Court held that "[t]he killing in the case at bar simply does not fall" within the category of subsection (h). Id.

Thus, following the dictates of Godfrey and focusing upon the "additional acts" rather than the "standardless and unchanneled" definition of subsection (h) in Dixon, it is indisputable that this aggravating circumstance was improperly applied by the court in this case. And this error also infects the application of this subsection by the jury; the court did not define subsection (h) in terms of the

requirement of "additional acts in its instruction to the jury (indeed, it defined none of the other aggravating or mitigating circumstances). This invalidates the recommendation of a death sentence. Godfrey v. Georgia, supra at 1765; Gregg v. Georgia, supra.[12]

F. Disparate Appellate Review By The Supreme Court of Florida In This Case Renders The Death Sentence Violative Of The Eighth And Fourteenth Amendments.

A key safeguard against arbitrary death sentences in Florida is the tripartite appellate review performed by the state Supreme Court. Proffitt v. Florida, 428 U.S. 242, 253 (1976). By virtue of its statewide jurisdiction and its commitment to proportionality, the Supreme Court of Florida can assure "consistency, fairness and rationality in the evenhanded operation of the State law." Proffitt v. Florida, 428 U.S. at 259-60; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Indeed, the Supreme Court of Florida has noted most recently that the constitutionality of Florida's capital sentencing procedure is contingent upon the Court's role of reviewing each case to ensure uniformity. Witt v. State, ___So.2d___ (Fla. 1980) (Case No. 58,329, Opinion filed 7/24/80).

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[12] As in Godfrey, the improper application of this circumstance "was in no way cured by the affirmance" of the Supreme Court of Florida. 100 S.Ct. at 1765. If anything, the error was rendered more egregious. As noted above, the sole basis for the finding by the trial court that subsection (h) was applicable was the helplessness of the victim. On appeal the Supreme Court of Florida added two further bases: defendant "in a calculated fashion 'executed' the victim to avoid later identification"; and the alleged statements of defendant that "he had killed someone before and it would not bother him to kill again."

Neither of these bases were relied upon by the trial court to establish subsection (h). The first was relied upon by the trial court, but to establish the aggravating circumstance of avoiding a lawful arrest under subsection (e). The second was purportedly introduced to rebut mitigating evidence, but was relied upon by the prosecutor as a non-statutory aggravating circumstance. Evidence of the propensity of a capital defendant to commit violent acts is irrelevant to subsection (h), Elledge v. State, supra, and the expressed state of mind of an accused long after the crime is also irrelevant under Florida law. See Magill v. State, 383 So.2d 901, 904 (Fla. 1980).

The Supreme Court thus improperly relied upon these two additional factors to bolster the improper application of subscription (h) by the trial court. More fundamentally, the affirmance of the death sentence upon a basis not relied upon by the trial court is a due process deprivation. See Presnell v. Georgia, 439 U.S. 14 (1978).

In performing its appellate review, the Supreme Court has held that aggravating factors must be strictly limited and applied; the erroneous consideration of aggravating factors will require resentencing where the effect of the error upon the weighing process cannot be assuredly ascertained. Elledge v. State, 346 So.2d 998 (Fla. 1977). Thus, as a general rule, the Supreme Court has reversed death sentences due to the improper consideration of aggravating factors so long as at least one mitigating circumstance has been found. See e.g., Mikenas v. State, 367 So.2d 606 (Fla. 1978).[13] Since speculation in conducting this review process is constitutionally impermissible, see Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759 (1980), the danger that the aggravating error affected the overall sentencing determination can be averted only where no factor in mitigation was found. See, e.g., Jackson v. State, 359 So.2d 1190 (1978); Gibson v. State, 351 So.2d 948 (1977).

Otherwise, the Court cannot reweigh the aggravating and mitigating factors, as it has explained:

> In capital cases, it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. Mikenas v. State, supra at 610.

The dual aggravating consideration of a single aspect of a capital offense is unlawful under Florida law. Provence v. State, 337 So.2d 783 (Fla. 1976). Thus, where a defendant is doubly penalized for a robbery-murder (aggravating circumstance (d)) committed for pecuniary gain (aggravating circumstance (f)), a resentencing will be required unless the weighing process could not have been affected by the error.

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[13] Indeed, that Court has reversed a death sentence where the sentencing order which reflected the erroneous aggravating factor was merely ambiguous as to whether any mitigating circumstances were found. Elledge v. State, 346 So.2d 998 (Fla. 1977)

The last [illegible] presented in this death penalty review scheme: defendant was doubly penalized for a robbery-murder committed for pecuniary gain despite the expressly found statutory mitigating circumstances of his youth (18 years) and no significant criminal history.[14] Though the Supreme Court acknowledged that a prohibited aggravating factor had been injected into the weighing process, it unilaterally reweighed the remaining aggravating factors and the mitigating factors previously found, and upheld the death sentence.[15]

This total departure from precedent is strikingly at odds with the Court's most recent reaffirmation of that precedent. Gafford v. State, ___So.2d___ (Fla. 1980), involved a premeditated killing during the course of a planned robbery and effected by strangulation and repeated stabbings. The trial judge found that this calculated homicide by Gafford was especially heinous, atrocious and cruel, had been committed during the course of a robbery, and with a pecuniary motive. The trial judge further found two statutory mitigating circumstances, Gafford's age of nineteen and lack of significant criminal history.

The Supreme Court of Florida held that Gafford was entitled to a new sentencing hearing due to the lower court's erroneous consideration of both robbery and pecuniary gain.[16] In applying its prior

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[14] According to the decision of the Supreme Court of Florida, the mitigating evidence further lent some support to the statutory circumstances of domination by the co-defendant and mental impairment. See Hargrave v. State, 366 So.2d at 5-6. Indeed, one member of the Court found evidence of these two circumstances so compelling as to conclusively tip the scales in favor of life. Hargrave v. State, 366 So.2d (Boyd, J. dissenting). This Court recognized the evidence in support of these mitigating factors but, without the benefit of Lockett v. Ohio, 438 U.S. 586 (1978), erroneously failed to consider it. (See Point A supra).

[15] In contrast to this reweighing where an aggravating circumstance improperly considered by trial jury and judge was the Court's refusal to reweigh "statutory" mitigating circumstances which the jury and court erroneously failed to weigh. (See Point A, supra). Ironically, the Court explained its refusal to reweigh the mitigating factors on the ground that this was not a case where the jury and court had not considered "matters it should not have considered." Hargrave v. State, supra at 5. Yet it was precisely such a case with regard to the consideration of the aggravating factors.

[16] The court noted that remand would afford the trial court the opportunity to consider the sentences meted out to co-defendants after Gafford had been sentenced. Notably, this Court did not have the opportunity to consider the twenty-year sentence that had been imposed upon the co-defendant Karge subsequent to defendant's death sentence

precedent, the Court ...led:

> We find, however, that in the instant case the doubling up of the aggravating factors coupled with the fact that the trial court found two mitigating circumstances requires us to remand under the doctrine we expressed in Provence and Gibson. Gafford v. State, supra (slip opinion).

In the case at bar, the factors in aggravation are virtually identical to those found in Gafford, save for the fact that defendant's offense was far less egregious. See Point D, supra. The same exact two mitigating factors in Gafford were specifically found by the courts in this case. The inexplicable disparity in result violates the Eighth Amendment as well as denying defendant due process and equal protection under the state and federal constitutions. See Isaac v. Engle, ____F.2d____, Case No. 78-3488 (6th Cir. 1980), opinion filed February 8, 1980; Bishop v. Mazurkiewicz, 484 F.Supp. 871 (W.D.Pa. 1980

The Court's disparate treatment in capital cases renders the Florida death penalty scheme unconstitutional as applied. Reliable death sentences are impossible where the Supreme Court speculates as to the mental processes of trial jury and judge.

G. The Death Penalty Is A Disproportionate Punishment In This Case.

In determining the propriety of death as punishment, "'There (must) be taken into account the circumstances of the offense together with the character and propensities of the offender.'" Gregg v. Georgi 428 U.S. 153, 190 (1976) (citation omitted). The inquiry is thus focused on "the particularized circumstances of the individual offense and the individual offender". Jurek v. Texas, 428 U.S. 262, 274 (1976 The punishment of death fits neither the offense in this case nor the defendant.

A punishment which is "excessive" in relation to the crime is barred by the Eighth Amendment. Gregg v. Georgia, supra at 171-73. An "excessive" punishment is one which "is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). Death is an "excessive punishment" for the offense in this case.

The death penalty is "an extreme sanction, suitable to the

most extreme of crimes." Gregg v. Georgia, supra at 187. In Florida, death sentences have been upheld only for such crimes. See, e.g. Foster v. State, 369 So.2d 928, 931 (Fla. 1979)(defendant, after engineering robbery of victim, cut his throat, dragged him into undergrowth, and returned to cut his spine); Smith v. State, 365 So.2d 704, 706-07 (Fla. 1978)(defendant forced victim into trunk of car at knifepoint, drove to secluded location, opened trunk and beat victim with a tire iron, saturated car with gasoline, and burned victim to death); Hoy v. State, 353 So.2d 826, 833 (Fla. 1977)(Defendant and accomplice raped young girl in presence of her fiance, killed him in her presence, shot her twice, raped her a second time, and then killed her); Adams v. State, 341 So.2d 765, 769 (Fla. 1976)(victim murdered by beating him "past the point of submission and until his body was grossly mangled"); Gardner v. State, 313 So.2d 675, 676 (Fla. 1975) (victim suffered approximately one hundred bruises to body, sexual mutilation, and massive hemorrhages of the head).

This case is simply not within the classification of these "most extreme of crimes". Taken in a light most favorable to the State, two proper aggravating circumstances exist, but this alone does not warrant the imposition of death. See Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). In Provence v. State, 337 So.2d 783, 784 (Fla. 1976), the defendant murdered the victim by stabbing him, and, as here, the killing occurred during a robbery. Circumstantial evidence indicated that the homicide had been previously planned by the defendant. Id. at 784-85. In Provence, unlike this case, no mitigating circumstances were found.

Nonetheless, the Supreme Court held that "the circumstances of this case are less aggravated than those present in other cases where this Court has reversed the trial court's imposition of the death penalty", and ruled that "the circumstances of the instant case do not call for the imposition of the death penalty." Id. at 787. The same conclusion is required here. Unlike Provence, the homicide in this case was perpetrated by gunshot -- and could not be within the definition of an "especially heinous" felony -- and was committed during a robbery. If anything, the actual homicide in Provence was more aggravated than that in this case.

Simply state there is "nothing more ocking in the actual killing (in this case) than in a majority of murder cases", and death is therefore a disproportionate penalty. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). The imposition of death in this case "would not be consistent with other sentences imposed in similar circumstances", and cannot be upheld on the basis of the crime. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979)(original emphasis). "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not", and the sentence is therefore violative of the Eighth Amendment. Godfrey v. Georgia, 100 S.Ct. 1765, 1767 (1980).

This conclusion is rendered of yet greater force when the powerful mitigating circumstances in the attached proffer are considered. Briefly, the evidence establishes that defendant was a viciously and tragically abused child, left dependent and victimized, perpetually searching for a "safe" place and a caretaker. See reports of Dr. Doris B. Stiles, Dr. Jeffrey J. Elenewski and Ms. Evalyn Milledge in Proffer in attached appendix. The evaluations of defendant and his family establish that his "caretaker", during his adolescent years, was Lawrence Karge (the co-defendant who instigated and planned the robbery and who, some two weeks after the trial of defendant was permitted to plead guilty to second-degree murder and was sentenced to 20 years). Id. As Dr. Stiles concludes:

> Lenson's needs for a nurturing caretaker, someone to relieve his overwhelming tension, anxiety, and fear, were met by Larry. . . . Lenson (was) able to talk to Larry. Under such circumstances, Lenson did anything and everything he could to please Larry, his new-found caretaker. Inasmuch as Larry is not a "domineering" person, Lenson's needs to please his perceived caretaker placed Larry in a position of strong control and dominance over Lenson. Report of Dr. Stiles at 42-43.

Dr. Stiles places the homicide in the context of the life history of defendant:

> Lenson's commission of armed robbery, and murder must be placed in the context of his family system. It is noteworthy that both of his parents have also committed serious acts (rape, aggravated assault, embezzlement) that could be considered criminal, as have at least two of his siblings (Child abuse, armed robbery). The consequence

> of the dysfunctional marital system on the children was inevitable since there was no appropriate therapeutic intervention to modify the family system. . . .
>
> When Lenson met Larry, they were friends, with Larry being a good listener for Lenson, and Lenson boosting Larry's ego with his loyalty. . . . . Larry planned the armed robbery, requesting Lenson to carry it out. Lenson agreed, especially when Larry suggested he might be "chicken." ANY PERCEIVED LOSS OF LARRY AS CARETAKER would have been psychologically intolerable to Lenson. . . . .
>
> Lenson agreed to robbery to please his "caretaker" in a familiar manner, by stealing. He had already learned, in his family of origin, that stealing is acceptable behavior when it is done for someone you love. When the attempted robbery was flawed by a jammed cash register, Lenson experienced further overwhelming constriction of his options . . . and pulled the trigger because, for him, there was no other choice. He shot again, to kill, for the same reason: he believed he had no other choice. His decision to kill was not premeditated but rather based on a very limited emotional/cognitive state, limited to one alternative, in order to preserve a relationship he believed he needed. Report of Dr. Stiles at 44-45.

Dr. Elenewski states:

> . . .There exists substantial evidence from numerous observers of the physical, sexual and mental abuse to which Mr. Hargrave was exposed. The portrait that emerges is one of a crucible of rejection, abuse, and usery. Mr. Hargrave apparently did emerge from this crucible with sufficient mettle to function as an independent adult. . . . My findings strongly support and confirm the existence of a family constellation replete with classical dynamics of physical, sexual and mental abuse. Mr. Hargrave's present psychological condition continues to show the deep emotional scars as well as chronic long-term psychopathology. The final picture which emerges is one of a dangerously disturbed, bizarre, and frankly, pathetic human being. Given his family and social context, it can be seen as inevitable that Mr. Hargrave would become a tragic and violent example of the human condition.
>
> * * *
>
> Taken as a whole, the results of the psychological testing place Mr. Hargrave in the diagnostic category of a severe Personality Disorder, Mixed Type. Alternative diagnoses are Personality Disorder, Inadequate Type and Personality Disorder, Dependent Type, both with Anti-social features. Testing indicates that Mr. Hargrave's behavioral pattern is characterized by pervasive ineffectual responses to emotional, social, intellectual and physical demands. . . .His personality structure indicates that he is the sort of individual who passively allows others tc assume responsibility for major areas of his life because of a lack of self-confidence and an inability to function independently. Mr. Hargrave subordinates his needs

> to those or others upon whom he [illegible]en[illegible]t in order to avoid any possibilit[illegible] of having to be self-reliant. Throughout his life Mr. Hargrave has always identified an external other who would fulfill the role of some sort of protector or (overseer). In his early development; it was his Mother. Later this function was taken over by his friend and companion, Larry Karge. . . .
>
> * * *
>
> . . . The information available to me suggests that Mr. Hargrave was involved in an intense pathological and symbiotic relationship with Mr. Karge. It is, therefore, psychologically consistent that he would perceive unacceptable rejection and derogation when Mr. Karge called him "chicken." It would also be psychologically consistent for Mr. Hargrave to engage in illegal stealing behavior for a loved one. His participation in the act of robbery and homicide can logically be viewed as the final explosion into consciousness of years of bottled up anger, rage, and alienation. For Mr. Hargrave, the taking of another person's life was most probably neither premeditated nor planned. His act of murder most probably was the uncontrolled and automatic behavior of a frustrated, frightened and overwhelmed human being. It was the clearly violent and unjustified act of a tormented, long abused and emotionally inadequate person. In the final analysis it can be seen as a tragically understandable act of a physical adult who was still functioning on the emotional level of an abused child. Report of Dr. Elenewski at 2, 6-7.

These brief excerpts from the attached proffer clearly indicate the range and breadth of the mitigating evidence in this case. That evidence is rendered of yet more effect in that it establishes a "causal relationship" between the mitigating factors present and the actual offense; the Supreme Court has consistently focused on such a "causal relationship" in reducing death sentences. See Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla. 1977). In short, neither the offense nor defendant, standing alone, warrant the imposition of the death sentence; considered together -- as they must be, Jurek v. Texas, supra -- they mandate its reduction to a life sentence.

CONCLUSION

Based upon the foregoing, defendant respectfully requests this Court to stay the pending death warrant (see simultaneously filed motion for stay of execution), grant an evidentiary hearing and an opportunity to fully brief the issues raised herein, and to vacate the judgment and/or sentence imposed in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

_____
KAREN M. GOTTLIEB
Assistant Public Defender

_____
BETH C. WEITZNER
Assistant Public Defender

_____
ROBERT R. SCHRANK
Assistant Public Defender

_____
WARREN S. SCHWARTZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was hand delivered to the Office of the State Attorney, 1351 Northwest 12th Street, Miami, Florida, and delivered to Joel D. Rosenblatt, Assistant Attorney General, Room 820, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 19th day of September, 1980.

_____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY
CRIMINAL DIVISION

CASE NO. 75-118A

THE STATE OF FLORIDA,

Plaintiff,

vs

LENSON A. HARGRAVE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE, DEFENDANT'S MOTION FOR STAY OF EXECUTION, STATE'S MOTION TO DISQUALIFY THE PUBLIC DEFENDER AND GRANTING DEFENDANT'S MOTION FOR EXPEDITED TRANSCRIPT

* * * * * * * * * * *

THE ABOVE CAUSE came before this Court for hearing upon the following pleadings: (1) Defendant's Motion to Vacate Judgment and Sentence and the State's Response thereto; (2) State's Motion to Disqualify the Public Defender, (3) Defendant's Motion for Stay of Execution.

Because of the nearness of date of execution, and the fact that regardless of this ruling, it would be immediately appeal it was agreed by respective counsel that rather than the Court preparing a written order of disposition, the parties would use the transcript of the proceedings as an order for the purpose of appeal to the Supreme Court of Florida; nevertheless, this Court, in order to eliminate any possibility of technical error, herewith submits its written order concerning the above motions. The Court considered the pleadings, oral argument by respective counsel and citations of law submitted by respective counsel.

As to defendant's Motion to Vacate Judgment and Sentenc the State opposed on two grounds; first, that the motion was not und oath; and second, that the motion is legally insufficient in that it presents grounds that were actually litigated on direct appeal or are otherwise inappropriate for a motion to vacate. Because of the time element and all other circumstances, the Court chose to disreg the fact that the motion was not under oath, counsel for defendant having assured the Court that a verification under oath could be obtained from defendant or defendant would testify personally to the Court in that regard. The Court is of the opinion that the State's position on the merits is well taken and that the Motion to Vacate insufficient as a matter of law, on the grounds cited by the State.

As to the State's M[illegible]ion to disqualify the Public Defender, the Court is of the opinion that the State's motion has merit but that again because of the element of time and to resolve every possible doubt in favor of the defendant, the Court chooses to deny the State's motion, at least until such time as this order can be ruled upon by the Supreme Court of Florida on appeal.

As to defendant's Motion for Stay of Execution, the Court is of the opinion that this Court's Judgment and Sentence, having been affirmed by the Supreme Court of Florida and the defendant's application to the Supreme Court of the United State for relief having been denied, this Court finds no reason to further delay the execution of the judgment and sentence, defendant having the opportunity to have a ruleing on this question by the Supreme Court of Florida.

After the Court had so ruled on the above motions, the defense moved for the authority to order expedited transcript of the proceedings. The State objected thereto. The Court is of the opinion that the State's objections contain some merit; however, again the Court resolves the doubt in favor of the defendant so that this matter can proceed to the Supreme Court of Florida expeditiously; wherefor it is,

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Vacate Judgment and Sentence be, and the same, is hereby DENIED;

2. That the State's Motion to Disqualify the Public Defender, be, and the same, is hereby DENIED;

3. That defendant's Motion for Stay of Execution, be, and the same, is hereby DENIED;

4. That Defendant's Motion for authority to order expedited transcript of the proceedings, be, and the same, is hereby GRANTED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 10th day of October, A. D., 1980.

Gene N. Williams
CIRCUIT JUDGE

cc: Jim Smith Attorney General
Elliot H. Scherker, Pub. Defender

Supreme Court of Florida

No. 59,731

LENSON A. HARGRAVE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 2, 1981]

PER CURIAM.

Appellant Lenson A. Hargrave brings this appeal to review the trial court's denial of his motion to vacate sentence under Florida Rule of Criminal Procedure 3.850. Appellant was sentenced to death for first-degree murder on July 18, 1975. His conviction and sentence were affirmed by this Court on direct appeal. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 913 (1979).

Hargrave filed his 3.850 motion to vacate and a motion for stay of execution on September 19, 1980. The trial court denied both motions ore tenus on September 26, 1980, followed by a written order filed on October 10, 1980. The 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process.* The trial court found, and we so hold, that the issues raised by appellant either were or could have been raised on direct appeal.

* On September 23, 1980, Hargrave brought a petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel due to counsel's failure to raise the issues on direct appeal. We denied the petition on September 24, 1980. Hargrave v. Wainwright, No. 59,701 (Fla. Sept. 24, 1980).

78

or they involve changes in decisional law not cognizable in a 3.850 motion. See Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979.; Spenkelink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); State v. Matera, 266 So.2d 661 (Fla. 1972); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 101 S.Ct. 796.

Accordingly, the order of the trial court denying 3.850 relief is affirmed, and the motion for stay of execution pending disposition of this appeal is denied.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,

Gene Williams, Judge - Case No. 75-118A

Bennett B. Brummer, Public Defender, and Elliot H. Scherker, Karen M. Gottlieb, Beth C. Weitzner and Robert R. Schrank, Assistant Public Defenders, Miami, Florida,

for Appellant

Jim Smith, Attorney General, and Joel D. Rosenblatt, Assistant Attorney General, Miami, Florida,

for Appellee

THE SOUTHERN DISTRICT OF FLORIDA

LENSON A. HARGRAVE,	:	
Petitioner,	:	CASE NO. 80-2679-CIV-JWK
v.	:	
LOUIE L. WAINWRIGHT, etc.,	:	ORDER OF DISMISSAL
Respondent.	:	

/

On May 6,1981 petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 after taking a voluntary dismissal of his initial petition that was filed in this Court on September 25,1980. His second petition, like the first one, seeks discharge from his judgment of conviction and sentence of death on the grounds that his conviction and death sentence was imposed upon him in violation of his constitutional rights. Specifically, petitioner asserts (1) that he received ineffective assistance of appellate counsel during his direct appeal, and (2) that he is affected by numerous sentencing irregularities which should result in the setting aside of his sentence of death.

Respondent has moved to dismiss the petition on the grounds, inter alia, that petitioner has not yet exhausted all of his state remedies prior to federal habeas corpus review. Respondent contends that petitioner has filed a mixed petition that contains both exhausted and unexhausted claims and therefore is subject to dismissal under the comity doctrine expressed in Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978). Petitioner has responded in opposition to this motion.

Because of the obvious importance of the matter, the Court held a hearing on the motion to dismiss and heard argument of counsel on the issues raised therein. While the Court does not fully accept the respondent's contention that exhaustion is required in this instance, in light of the recent pronouncement of the United State Supreme Court in Estelle v. Smith, 49 U.S.L.W. 4490 (1981), it is the Court's judgment that a return to the state for reconsideration of the issue raised in the petition challenging the admission into evidence of testimony by a court-appointed psychologist would not be fruitless. It appears that

the law has changed sufficiently to warrant reexamination of the issue by the state courts.

The Florida Supreme Court has recently had occasion to comment upon the finality of postconviction relief under these circumstances:

> [W]e today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt v. State, 387 So2d 922, 931 (Fla. 1980).

Whether the issue raised by petitioner sub judice meets the criteria set forth above should be finally decided by the state courts, not this Court. Accordingly, this Court will refrain from deciding the federal issues raised by the petitioner until the Florida courts have the opportunity to review whether petitioner's sentence of death should be upheld where a court appointed psychologist was allowed to testify as to his examination of petitioner without first advising petitioner of his Miranda rights.

It is therefore

ORDERED AND ADJUDGED that the motion to dismiss is GRANTED and this cause is hereby DISMISSED without prejudice to reapply after all issues have been fully exhausted in the state courts.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of June 1981.

James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies Furnished to:

Elliot H. Scherker, Esq.
Joel D. Rosenblatt, Ass't Atty Gen.

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254

80-2679 -CIV-JWK

Name: Lenson Hargrave

Prison number: 047810

Place of confinement: Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

LENSON A. HARGRAVE,

Petitioner,

vs. CASE NUMBER:

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

a. Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County.

b. Honorable Gene Williams, Circuit Judge, Miami, Dade County, Florida.

FILED 5/24/83 TO JUDGE

BY

2. The date of the judgment of conviction is July 18, 1975.

3. The sentence is death by electrocution.

4. The nature of the offense involved is first-degree murder.

5. Petitioner entered a plea of not guilty.

6. Petitioner was tried by jury.

7. Petitioner did not testify at trial.

8. Petitioner appealed from the judgment and sentence.

9. The history of the direct appellate proceedings is as follows:

a. The Supreme Court of Florida affirmed the judgment and sentence of the trial court on June 20, 1978. Hargrave v. State, 366 So.2d 1 (Fla. 1978)(Boyd and Hatchett, JJ. dissenting). A timely petition for rehearing was denied on February 6, 1979.

b. The Supreme Court of the United States denied a petition for writ of certiorari on October 15, 1979. Hargrave v. Florida, 444 U.S. 919 (1979). Rehearing was denied on December 3, 1979.

10. In addition to the above-described direct review proceedings, the other petitions, applications, motions or proceedings filed on behalf of petitioner with respect to the judgment attacked herein are described in paragraph 11 below.

11.

a. Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Circuit Court of the Eleventh Judicial

Circuit of Florida on September 23, 1980. The motion was denied on September 26, 1980. A timely appeal from this order was taken to the Supreme Court of Florida. On April 2, 1981, the Supreme Court affirmed the order of the trial court. Hargrave v. State, 396 So.2d 1127 (Fla. 1981).

b. A petition for writ of habeas corpus was filed in Supreme Court of Florida on September 23, 1980. The petition was denied on September 24, 1980. Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980).

c. A petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 was filed in this Court on September 25, 1980, prior to full exhaustion of state remedies. The petition was voluntarily dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure subsequent to the grant of a stay of execution by the Supreme Court of Florida. See subparagraph d, infra.

d. A joint application for extraordinary relief and petition for writ of habeas corpus was filed on behalf of 123 death-sentenced defendants, including petitioner, in the Supreme Court of Florida on September 29, 1980. On that date, the Supreme Court issued an order staying the execution of petitioner. The petition was denied on January 15, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for writ of certiorari was denied on November 2, 1981. Brown v. Wainwright, 454 U.S. 1000 (1981).

e. A petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 was filed in this Court on May 6, 1981. The petition was dismissed without prejudice for further exhaustion of state remedies on June 19, 1981.

f. A motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure was filed in the Circuit Court of the Eleventh Judicial Circuit of Florida on July 13, 1981. The motion was denied on February 26, 1982. A timely appeal from the order was taken to the Supreme Court of Florida, which affirmed the order of the trial court on January 13, 1983. Hargrave vs. State, ____So.2d____, Case No. 61, 869 (Fla. 1983), opinion filed January 13, 1983. Rehearing was denied on

GROUNDS FOR RELIEF

12. The conviction and death sentence in this case are violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States:

A. Denial of effective assistance of appellate counsel: petitioner was denied the effective assistance of court-appointed appellate counsel in violation of the Sixth and Fourteenth Amendments, due to the failure of counsel to raise on direct appeal two meritorious issues relating to the conviction of petitioner, which had been properly raised and preserved for appellate review in the trial court, and which would have had an arguable

chance of success on direct appeal.

1. In trial proceedings, counsel for petitioner moved to suppress a post-arrest statement of petitioner, the only evidence of his participation in this offense which was introduced at trial, on the ground that it was the product of an unlawful arrest. This issue was not raised on direct appeal.

2. During the course of trial, the prosecutor and the trial judge repeatedly made comments which referred to the fact that petitioner had not testified at trial. Trial counsel properly objected to these comments and repeatedly moved the court to grant a mistrial. This issue was not raised on direct appeal.

3. See attached memorandum of law for additional facts.

B. Denial of fair and impartial jury: the exclusion from the jury panel of persons morally opposed to death penalty and/or persons who would not vote to impose a death sentence but who could have been fair on the issue of guilt or innocence denied petitioner a jury selected from a fair cross-section of the community and a neutral and impartial jury, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

C. Denial of full opportunity to present and consideration of mitigating circumstances in imposition

and review of death sentence: petitioner was deprived of the means and opportunity to present all relevant evidence in mitigation of sentence at trial, by the ruling of the trial court and the belief of counsel for the parties that potential mitigating circumstances were limited to those specified in Section 921.141(6), Florida Statutes (1975), the instructions of the trial court and comments of the prosecutor to the jury that the mitigating circumstances were so limited, and the restriction by the trial court upon the range of mitigating circumstances in its imposition of a death sentence, and was denied full consideration of mitigating circumstances by the Supreme Court of Florida in its review of the death sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

D. Admission into evidence of psychological testimony obtained in violation of privilege against self-incrimination and right to counsel in sentencing phase: the presentation by the prosecution in the penalty phase of the trial of the testimony of a court-appointed psychologist who had examined petitioner to determine his competency to stand trial violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States in that neither petitioner nor his counsel were advised prior to the

examination that the results of the examination could be introduced in seeking the death penalty, and petitioner was not advised that he had a right to remain silent, could terminate the interview if he so wished, or that he could confer with counsel prior to the examination (see attached memorandum for additional facts).

E. Overbroad application of aggravating circumstance: the trial court failed to properly limit the application of Section 921.141(h), Florida Statutes (1975), in its instructions to the jury and the trial court and the Supreme Court of Florida found subsection (5)(h) applicable to this case based upon an overbroad construction of that circumstance, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

F. Reweighing of aggravating and mitigating circumstances by state supreme court: the Supreme Court, after finding that the trial court had erred in applying an aggravating factor in sentencing petitioner to death, reweighed the remaining aggravating circumstances and the mitigating circumstances and determined that death was the appropriate sentence, in violation of its own precedent and the Eighth and Fourteenth Amendments to the Constitution of the United States.

G. Disproportionate imposition of death sentence: the imposition of a death sentence, on the facts of this

case, is disproportionate in comparison with other Florida cases in which death has been held an inappropriate punishment, and in contrast with Florida cases in which death has been held properly imposed, rendering the death sentence in this case unlawful under the Eighth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

13. Each of the grounds listed in paragraph 12 have been presented to the Supreme Court of Florida.

14. There are no petitions, motions, or applications pending in any court with respect to the conviction and sentence in this case.

15. Petitioner has been represented by the following counsel:

a. at trial and sentencing by Douglas Williams and Michael Tarre of Miami, Florida.

b. on direct appeal to the Supreme Court of Florida and on the petition for writ of certiorari in the Supreme Court of the United States by Bennett E. Brummer, Public Defender and Paul Morris, Assistant Public Defender and Elliot H. Scherker, Karen M. Gottlieb, Beth C. Weitzner, Robert R. Schrank, and Warren S. Schwartz, Assistant Public Defenders, of Miami, Florida.

16. Petitioner was not sentenced on more than one count of an indictment or on more than one indictment in the same court at the same time.

sentence of death, and to grant such and further relief as this Court shall deem appropriate.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

VERIFICATION

STATE OF FLORIDA

SS

COUNTY OF BRADFORD

BEFORE ME, the undersigned, personally appeared LENSON A. HARGRAVE, who being first duly sworn, deposes and says that the facts in the foregoing petition are true and correct to the best of his knowledge and belief.

LENSON A. HARGRAVE

Sworn to and subscribed before me this 26 day of January, 1983.

Notary Public
State of Florida at Large
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 26, 1984

STATE OF FLORIDA

SS

COUNTY OF DADE

BEFORE ME, the undersigned, personally appeared ELLIOT H. SCHERKER, who being first duly sworn, deposes and says that the facts in the foregoing petition are true and correct to the best of his knowledge and belief.

ELLIOT H. SCHERKER

Sworn to and subscribed before me this 24th day of March, 1983.

Notary Public
State of Florida at Large
Notary Public, State of Florida
My Commission Expires Feb. 6, 1984
Bonded Thru Troy Fain-Insurance, Inc.

126

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition for writ of habeas corpus by person in state custody was hand delivered to PAUL MENDELSON, Assistant Attorney General, 401 N.W. Second Avenue, Room 820, Miami, Florida this 24th day of March, 1983.

ELLIOT H. SCHERKER
Assistant Public Defender

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 84-5102

LENSON A. HARGRAVE,

Petitioner/Appellant,

vs.

RICHARD DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Nature of Preference

Habeas Corpus, 28 U.S.C. §2254

EN BANC BRIEF OF RESPONDENT/APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RICHARD E. DORAN
RALPH BARREIRA
Assistant Attorneys General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

STATEMENT REGARDING PREFERENCE

This appeal is taken from a final order denying a petition for writ of habeas corpus filed on behalf of petitioner-appellant, a state prisoner, under 28 U.S.C. §2254. Pursuant to Eleventh Circuit Rule II, this case is entitled to preference under subsection (a)(3) of Appendix One to the rules.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered this cause to be heard en banc with oral argument.

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	
STATEMENT REGARDING PREFERENCE.....	-i-
STATEMENT REGARDING ORAL ARGUMENT.....	-ii-
TABLE OF CITATIONS.....	IV - IX
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF JURISDICTION.....	3
SUMMARY OF ARGUMENT.....	4-5
ARGUMENT.....	6-45
I	
THE DEATH SENTENCE IMPOSED UPON PETITIONER IS UNLAWFUL, IN THAT HE WAS DENIED THE OPPORTUNITY TO PRESENT AND CONSIDERED NONSTATUTORY MITIGATING CIRCUMSTANCES AT SENTENCING, THE JURY WAS INSTRUCTED TO WEIGHT AS MITIGATING ONLY THAT EVIDENCE WHICH SATISFIED THE STANDARDS OF THE STATUTORY MITIGATING CIRCUMSTANCES, AND THE TRIAL COURT AND STATE SUPREME COURT FAILED TO GIVE MITIGATORY WEIGHT TO NONSTATUTORY MITIGATING CIRCUMSTANCES.....	6-43
II	
SECTION 921.141(5)(h), FLORIDA STATUTES (1975), ESTABLISHING AS A POTENTIAL AGGRATING CIRCUMSTANCE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, " IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED IN THIS CASE BY THE STATE TRIAL COURT AND SUPREME COURT.....	43-44
CONCLUSION.....	45
CERTIFICATE OF SERVICE.....	45

TABLE OF CITATIONS

	Page
ADAMS V. STATE 380 So.2d 423 (Fla. 1980)	23
ADAMS V. WAINWRIGHT 804 F.2d 1526 (11th Cir. 1986)	6, 7, 27,28
* ALDRIDGE V. STATE 12 F.L.W. 129 (Fla. March 12, 1987)	25
* ALVORD V. WAINWRIGHT 725 F.2d 1282 (11th Cir.), cert. denied 469 U.S. 956 (1984)	33
BOOKER V. WAINWRIGHT 703 F.2d. 1251 (11th Cir.), cert, denied 464 U.S. 922 (1983)	36
CALIFORNIA V. BROWN 479 U.S. ___ 107 S.Ct. ___ 93 L.Ed.2d 934 (1987)	29, 42
CAMPBELL V. STATE 338 So.2d 843 (Fla. 1st DCA 1976)	21
CAMPBELL V. WAINWRIGHT 738 F.2d 1573 (11th Cir. 1984), cert. denied ___ U.S. ___ 106 S.Ct. 1652 (1986)	6, 12, 20, 21
CITY OF MIAMI V. MURPHY 137 So.2d 825 (Fla. 1962)	18
COOPER V. WAINWRIGHT 807 F.2d 881 (11th Cir. 1986)	
CRIDER V. KEDHANE 526 F.S. 727 (D.C. Okla. 1981)	13
DOBBERT V. STRICKLAND 718 F.2d 1518 (11th Cir. 1983), cert. denied 468 U.S. 1220 (1984)	35
EDDINGS V. OKLAHOMA 455 U.S. 104 (1982)	7, 40
FIESTA FASHION INC. V. CAPIN 450 So.2d 1047 (Fla. 3d DCA) Approved 397 So.2d 643 (Fla. 1987)	11

	Page
* FORD V. STRICKLAND 696 F.2d 804 (11th Cir.) (en banc), cert. denied 464 U.S. 865 (1983)	42
* FOSTER V. STRICKLAND 707 F.2d 1339 (11th Cir. 1983), cert. denied 466 U.S. 993 (1984)	6, 36
FRANCOIS V. WAINWRIGHT 741 F.2d 1275 (11th Cir. 1984)	10
FRANCOIS V. WAINWTIGHT 763 F.2d 1188 (11th Cir. 1985)	35
GARCIA V. STATE 492 So.2d 360 (Fla. 1986)	18
HARGRAVE V. SATE 366 So.2d 1 (Fla. 1978) cert. denied 444 U.S. 919 (1979)	19,
HARGRAVE V. STATE 396 So.2d 1127 (Fla. 1981)	20
HARGRAVE V. WAINWRIGHT 388 So.2d 1021 (Fla. 1980)	20
HARGRAVE V. WAINWRIGHT 804 F.ed 1182 (11th Cir. 1986), vacated ___ F.2d ___ (11th Cir. Jan. 26, 1987)	6, 10, 14, 20,
HARVARD V. STATE 486 So.2d 537 (Fla.), cert. denied ___ U.S. ___ 107 S.Ct. 215 (1986)	25
HENDERSON V. STATE 463 So.2d 196 (Fla. 1985)	44
HARICH V. WAINWRIGHT No, 86-3167 (11th Cir. March 18, 1987)	27, 40,
* HITCHCOCK V. WAINWRIGHT 770 F.2d 1514 (11th Cir. 1985) (en banc), cert. granted ___ U.S. ___ 106 S.Ct. 2888 (1986)	30
IN RE GRAND JURY INVESTIGATION 542 F.2d 166 (3d Cir.) cert. denied 97 S.Ct. 775 (1977)	13

	Page
JACKSON V. STATE 452 So.2d 533 (Fla. 1984)	19
JARRARD V. ASSOCIATES DISCOUNT CORPORATION 99 So.2d 272 (Fla. 1957)	18
JOHNSON V. WAINWRIGHT 778 F.2d 623 (11th Cir. 1985)	20
JOHNSON V. WAINWRIGHT 806 F.2d 1479 (11th Cir. 1986)	35
LESLIE BROTHERS V. ROOPE 108 Fla. 289 148 So.2d 212 (Fla. 1933)	14
LOCKETT V. OHIO 438 U.S. 586 (1978)	7, 20
LUCAS V. STATE 490 So.2d 943 (Fla. 1986)	43
McGAUTHA V. CALFIRONIA 402 U.S. 183 (1971)	29
MONTGOMERY V. DEPART. OF HEALTH AND REHABILITATION SERVICES 468 So.2d 1014 (Fla. 1st DCA 1985)	16
MORGANO V. STATE 439 So.2d 924 (Fla. App. 1983)	18
* MURRAY V. CARRIER 477 U.S. 106 S.Ct. 2639 91 L.Ed.2d 397 (1986)	30
NELSON V. SELDON CYPRUS DOOR COMPANY 78 Fla. 203 83 So. 286 (Fla. 1919)	11
OLIVER V. WAINWRIGHT 795 F.2d (11th Cir. 1986)	6, 12, 15
PARKER V. STATE 458 So.2d 750 (Fla. 1984)	
PARKER V. STATE 476 So.2d 134 (Fla. 1985)	19

Page

* PENNSYLVANIA EX REL SULLIVAN V. ASHE
302 U.S. 52
82 L.Ed. 43 (1933) 28

PHILLIPS V. STATE
476 So.2d 194 (Fla. 1984) 44

POLYCOAT CORP. V. HIRSH INDUSTRIES
442 So.2d 958 (Fla. 4th DCA 1984) 11

PRICE WISE BUYING GROUP V. NUZUM
343 So.2d 115 (Fla. App. 1977) 11,14

PROFFITT V. WAINWRIGHT
597 F.2d 474 (5th Cir.), cert. denied
444 U.S. 868 (1979) 7, 44

RATCLIFF V. ESTELLE
597 F.2d 474 (5th Cir.), cert. denied
444 U.S. 868 (1979) 13

REED V. ROSS
468 U.S. 1
104 S.Ct. 2901
82 L.Ed.2d 1 (1984) 30

REGAN V. ITT INDUSTRIAL CREDIT COMPANY
469 So.2d 1387 (Fla. 1st DCA 1984) 11

* SMITH V. MURRAY
477 U.S.
106 S.Ct. 2661
91 L.Ed.2d 434 (1986) 29

* SONGER V. STATE
365 So.2d 696 (Fla. 1978), cert. denied
441 U.S. 956 (1979) 12, 37-38

* SONGER V. WAINWRIGHT
769 F.2d 1488 (11th Cir. 1985) (en banc) 26

SPENKELINK V. STATE
350 So.2d 85 (Fla. 1977) 23

SQUIRES V. STATE
450 So.2d 208 (Fla. 1984) 44

STATE V. MATERA
266 So.2d 661 (Fla. 1972) 24

STATE V. NEIL
457 So.2d 481 (Fla. 1984) 19

	Page
STRAIGHT V. WAINWRIGHT 772 F.ed 647 (11th Cir. 1985)	8, 9, 35
SWAN V. ALABAMA 380 U.S. 202 (1965)	19,
SULLIVAN V. STATE 372 So.2d 938 (Fla. 1979)	23
SUNDELL V. STATE 354 So.ed 409 (Fla. 1978)	19
TAYLOR V. FINLAYSON 176 So. 44 (Fla. 1936)	11
THOMAS V. STATE 421 So.2d 160 (Fla. 1982)	20
THOMAS V. WAINWRIGHT 767 F.2d 738 (11th Cir. 1985), cert. denied ___ U. S. ___ 106 S.Ct. 1241 (1986)	35, 39
THOMPSON V. WAINWRIGHT 787 F.Ed. 1447 (11th Cir. 1986)	40
TROEDEL V. STATE 462 So.2d 1447 (11th Cir. 1986)	44
VAZ BORRALAO V. KEY DRILL COMPANY 710 F.ed 207 (5th Cir. 1983)	13
WAINWRIGHT V. SYKES 433 U.S. 72 (1977)	23
WILLINSKY V. TATE 360 So.ed 760 (Fla. 1978)	18
* WITT V. STATE 387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980)	24
WOLACK V. STATE 464 So.2d 587 (Fla. App.), review denied 476 So.2d 676 (Fla. 1985)	18
WOODSON V. NORTH CAROLINA 428 U.S. 280 (1976)	29

Page

OTHER AUTHORITIES

FLORIDA CONSTITUTION, ARTICLE V, SECTION 2(a) 14

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 3.14(b) (1962) 14, 16
Rule 3.7(d) (1962) 17
Rule 9.210(a) 17
Rulr 9.140(f) 19

FLORIDA STATUTES

Section 921.141 (1972) 19

* MODEL PENAL CODE

Section 210(g)
[Proposed Official Draft, 1962] 29

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-5102

LENSON A. HARGRAVE,

Petitioner-Appellant,

vs.

RICHARD DUGGER, as
Secretary, Department of Corrections,
State of Florida,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

EN BANC BRIEF OF RESPONDENT-APPELLEE

STATEMENT OF THE ISSUES

I

WHETHER THE DEATH SENTENCE IMPOSED UPON PETITIONER IS UNLAWFUL, IN THAT HE WAS DENIED THE OPPORTUNITY TO PRESENT AND HAVE CONSIDERED NON-STATUTORY MITIGATING CIRCUMSTANCES AT SENTENCING, THE JURY WAS INSTRUCTED TO WEIGH AS MITIGATING ONLY THAT EVIDENCE WHICH SATISFIED THE STANDARDS OF THE STATUTORY MITIGATING CIRCUMSTANCES, AND THE TRIAL COURT AND STATE SUPREME COURT FAILED TO GIVE MITIGATORY WEIGHT TO NONSTATUTORY MITIGATING CIRCUMSTANCES.

II

WHETHER SECTION 921.141(5)(h), FLORIDA STATUTES (1975), ESTABLISHING AS A POTENTIAL AGGRAVATING CIRCUMSTANCE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED IN THIS CASE BY THE STATE TRIAL COURT AND SUPREME COURT.

INTRODUCTION

This appeal was taken from a final order of the United States District Court for the Southern District of Florida denying a petition filed on behalf of Hargrave, a state prisoner in the custody of Richard Dugger, the Secretary of the Florida Department of Corrections.

The symbol "R" will be utilized to designate Volumes I and II of the Record on Appeal and the symbol "T" to designate Volume III of the record. The appendix to the petition, which has been transmitted to this Court by the district court, will be referred to as follows: the symbol "S.R." will designate Volumes I through IV, which are comprised of excerpts from the state-court record, and the symbol "S.T." will designate Volumes V through X, the state transcript. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set out in its original brief. Additional copies of this brief can be provided in speedy fashion if requested.

STATEMENT OF JURISDICTION

This appeal was taken from a final order denying a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 and 28 U.S.C. §2253.

SUMMARY OF ARGUMENT

The panel opinion in this case, Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1986) accurately assess the impact of controlling circuit precedent on the facts developed from an extensive and detailed state court record and no remand is necessary for a further evidentiary hearing. Petitioner's allegations of conflict between the panel decision and other circuit decisions are easily difused by careful review of the facts and attendant circumstances.

The Lockett claims are procedurally barred and not subject to an exception based on "cause and prejudice" or any inconsistent application of the state procedural bar by the state court. Furthermore, like so many former state petitioners, this Defendant had the benefit of strong representation of counsel, including the presentation of non-statutory mitigating evidence to both the jury and trial court. As such the claimed Lockett violations are meritless.

The constitutional challenge to the application of the aggravating factor "heinous, atrocious and cruel" was denied by the panel and not raised in the petition for rehearing. It therefore merits no consideration. In any event no

conflict is shown and the caselav continues to prove this factor was correctly applied in this case.

ARGUMENT

I

THE DEATH SENTENCE IMPOSED UPON THE PETITIONER IS NOT UNLAWFUL IN THAT HE WAS GRANTED THE OPPORTUNITY TO PRESENT AND HAVE CONSIDERED NON-STATUTORY MITIGATING EVIDENCE AT HIS SENTENCING; THE JURY WAS NOT INSTRUCTED IN A MANNER THAT LIMITED ITS ABILITY TO WEIGH AS MITIGATION THAT EVIDENCE PRESENTED BY THE PETITIONER WHICH FELL OUTSIDE THE STATUTORY MITIGATING FACTORS; AND THE TRIAL JUDGE AND STATE SUPREME COURT CORRECTLY EVALUATED AND WEIGHED THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN A MANNER CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This case is before this Court en banc following the petition for rehearing and suggestion for rehearing en banc by Petitioner in Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1987). Petitioner suggests the panel opinion is in conflict with a number of prior opinions of this Court: Adams v. Wainwright, No. 86-3207 (11th Cir. 1986) (rehearing pending); Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983).

and Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Petitioner also suggests conflict with Eddings v. Oklahoma, 455 U.S. 104 (1982). (Petition for rehearing and suggestion for rehearing en banc, page i).

Even under the very focused standard for rehearing in Rule 26 of the Rules of the Eleventh Circuit Court of Appeals, the request for rehearing was limited to two matters. First, whether the panel was correct in finding the Petitioner failed to properly raise the merits of his jury instruction claim, his trial counsel's ineffectiveness claim or his trial court method of sentencing claim [All under the umbrella of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)] and was barred from raising those claims in federal court due to a lack of showing of either cause or prejudice that would excuse the lack of diligence in state court. Second, whether the panel's discussion of "cause" to excuse a procedural bar conflicts with Adams v. Wainwright, supra and additionally ignores a line of prior decisions holding the "Lockett claims" were unavailable to lawyers defending accused and/or convicted murders in Florida during the same period of time as Petitioner's case. At the time of filing for rehearing

and rehearing en banc Petitioner was apparently satisfied with the remaining portions of the panel opinion. The Respondent will therefore endeavor to show why the panel opinion is in harmony with the general law in the circuit, and not factually in conflict with the cases cited by Petitioner, where the Petitioner has incorrectly applied existing precedent to the facts of this case, and how the court en banc might approach this case with an eye towards diffusing any perceived conflict among the decisions.

A. PETITIONER'S CLAIM IS BARRED FROM FEDERAL HABEAS CORPUS REVIEW BY STATE PROCEDURAL DEFAULT.

1. THE JURY INSTRUCTION CLAIM

In Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985) this Court reaffirmed previous panel decisions holding that the State of Florida consistently applies a contemporaneous objection requirement to direct appeal issues and a procedural bar to attempts at litigating direct appeal issues by collateral attack. One of the claims raised in Straight concerned the jury instruction on mitigation:

> During the penalty phase of Straight's trial, the trial judge instructed the jury, "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence." State Record Vol. 14, pp. 29-30. The judge then read the statutory aggravating circumstances. She next instructed the jury, "The mitigating circumstances which you may consider, if established by the evidence, are these..." Id. p. 32. The statutory mitigating circumstances were read. Straight contends that the latter instruction failed to adequately inform the jurors that they could also consider non-statutory factors in mitigation. He suggests that his prior history of drug abuse and psychotherapy and his less extensive participation in the murder were two non-statutory mitigating circumstances that could have been considered by the jury. The district court found that Straight had failed to object in the trial court or on direct appeal as required by Florida law, thereby precluding a review in the federal courts. We agree with the district court.
>
> Id. at 677.

This case mirrors Straight. The panel notes that no objection was raised at trial to an instruction on mitigation that was identical to the instruction found in Straight. (ST.982-985). The panel opinion also notes the Petitioner failed to brief the matter of jury instruction in accordance with the Florida Rules of Appellate Procedure (1962), by not raising the issue in his an initial brief.

Thus, by waiting until an opinion was filed and raising the claim in a motion for rehearing the Petitioner procedurally defaulted in state court on the jury instruction issue. Hargrave v. Wainwright, 804 F.2d at 1187-88.

With all due respect for the panel, there is no need to discuss whether the state supreme court reviewed the motion for rehearing on the issue of jury instructions. The Respondent has continuously argued, in the federal district and circuit court, that the issue was waived in the trial court. Florida Rule of Criminal Procedure 3.390(d). (Brief of Respondent, pages 23-24). Unless a jury instruction is subject to contemporaneous objection so as to advise the trial court of a perceived error and allow it the opportunity to correct that error, the matter is not subject to review on appeal. "The Florida courts have applied this rule consistently." Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984) and the state cases cited therein. Accordingly, the district court should be and can be affirmed without discussion of the rehearing process unless the cause and prejudice standard is met.[1]

[1] See the discussion on this infra.

As to the rehearing motion, Petitioner concedes the case of Price Wise Buying Group v. Nuzum, 343 S.2d 115, 117 (Fla. 1st DCA 1977), cited in the panel opinion, is controlling unless the exception for "interest of justice" is granted. (En Banc Brief of Petitioner pages 11-12). A more accurate definition of the exception is found in Regan v. ITT Industrial Credit Company, 469 So.2d 1387, 1390 (Fla. 1st DCA 1984). There, Appellant filed a motion for extraordinary relief after filing a motion for rehearing. The appellate court granted the relief requested and withdrew its prior opinion as offensive to "fundamental principles governing the administration of justice." Id. at 1390. Fundamental error was also mentioned as the standard by Florida's Fourth District Court of Appeal in Polyglycoat Corporation v. Hirsch Distributors, 442 So.2d 958 (Fla. 4th DCA 1984). There, the failure to argue the other party's lack of objection until the opinion issued was held insufficient for rehearing purposes.

The strict application of this rule is not subject to serious dispute. See generally Nelson v. Seldon Cyprus Door Company, 78 Fla. 203, 83 So. 286 (Fla. 1919) (no allowance for new issue on rehearing); Taylor v. Finlayson, 176 So. 44 (Fla. Div. B., 1936) (rehearing only by special permission); and Fiesta Fashion Inc. v. Capin, 350 So.2d 1047, 1052-53, (Fla. 3d DCA 1979) approved 397 So.2d 643 (Fla. 1981) and

cases cited therein. Petitioner cannot meet the exception because his overlooked issue was not fundamental in nature. As admitted in footnote 8 of Petitioner's En Banc Brief, the particular claim on exclusivity of mitigating factors was rejected by the Florida Supreme Court, some six weeks prior to its denial of rehearing without opinion in Petitioner's case, in Songer v. State, 365 So.2d 696, 700 (Fla. 1978). Logically, no fundamental error exception could exist to excuse Petitioner's default if the court had previously found no error in the statute from which the instruction was derived.

Petitioner places much emphasis on the language used by the state supreme court in denying the motion for rehearing and holding the Respondent's motion to strike moot. Petitioner suggests the failure to strike its rehearing motion compels the conclusion that the court accepted the pleading as a valid exception to its own rule and reached a decision on the merits. Alternatively, Petitioner contends that the absence of certainty regarding application of a procedural bar, due to the brevity of the order on rehearing, places this court in a position from which it must address the merits. Compare Campbell v. Wainwright, 738 F.2d 1573, 1577 (11th Cir. 1986); and Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986). This argument has several flaws.

First, the court must keep in mind the phrasing of Florida's rehearing rule and its extremely limited focus on matters the court has overlooked or misapprehended. The Florida Rule follows the federal provision. Rule 40, Federal Rules of Appellate Procedure. The similarity does not end with the rules. The Federal appellate courts will not reverse a lower court on the basis of a claim not raised at trial or in the appellate court prior to the filing of a rehearing petition. Vaz Borralho v. Key Dril Company, 710 F.2d 207, 213 (5th Cir. 1983). A Federal Court of Appeals order denying rehearing does not imply a judgment on the merits and has no jurisprudential significance." In Re Grand Jury Investigation of Hartzell, 542 F.2d 166, 173 (3d Cir. 1976) cert. denied, 97 S.Ct. 755 (1977). Nor does a Federal appellate court reach the merits of a motion to strike for mootness (and implicity deny the motion) when it renders an order stating "upon consideration of the arguments of Appellee, the petition for rehearing and motion to supplement the record are hereby denied." Crider v. Kedhane, 526 F.Supp. 727 (D.C. Okla. 1981).

Second, the court must keep in mind the binding precedent of Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.) cert. denied, 444 U.S. 868 (1979) wherein the brevity of an appellate opinion of the state courts was tied to a detailed order finding procedural bar by the trial court, so

as to overcome the presumption that the merits were reached by the appellate court. This holding is critical to analyzing the current matter because it provides a framework for the application of an independent and adequate state law basis for denying relief.

Florida's Supreme Court promulgates the state rules of appellate procedure. Article V, Section 2(A), Fla. Const. The rules of appellate procedure expressly forbid (in contrast to Oklahoma's Rule 1.18) the raising of new issues or their consideration on rehearing.[2] The panel's citation to former Rule 3.14(b) of the Florida Appellate Rules (1962) and the cases of Leslie Brothers v. Roope, 108 Fla. 289, 148 So. 212 (Fla. 1933) and Price Wise Buying Group, supra, accurately reflect this. Hargrave at 1187.

[2]Petitioner's analogy comparing his case with Eddings v. Oklahoma, 455 U.S. 104 (1982) misses the mark. The real analogy, if one exists, is between Eddings and Songer v. State. Songer was the Florida Supreme Court's choice for exploring if Lockett v. Ohio had triggered any fundamental changes in the death penalty law, and it therefore utilized the exception to its rule against litigation of new issues on rehearing. Once the court satisfied itself that Lockett did not impact upon the administration of capital punishment in Florida in any fundamental manner, there was no basis to utilize the exception to the rule in the instant case. This explains why, six weeks after Songer, the Petitioner's rehearing was denied.

Just as a federal district court must assume a summary denial of an appeal from an order applying a procedural default analysis means the merits were not reviewed, so must it assume the state appellate court adhered to its own strict default rule for rehearing motions when the state appellate court holds:

> Upon consideration of [the] petition for rehearing filed by attorney for appellant.
>
> It is ordered by the court that said petition be and the same is denied. Appellee's motion to strike is hereby moot.
>
> (S.R.122).

Petitioner is incorrect in assuming the Florida Supreme Court had to affirmatively strike his motion for rehearing to apply a procedural bar to his newly raised Lockett claims. Unlike the situation in Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1984), the indication of the application of a procedural bar is inherent in the rules of appellate procedure. In other words, the complete opposite of Petitioner's argument is true. An affirmative showing must be made to avoid procedural default and an invocation of the exception for fundamental injustice must be forthcoming from the appellate court. The same was not true in the Oliver case where a per curiam affirmance was not anchored to any framework as sturdy as the rule on matters for rehearing.

This conclusion is not diminished by the state court's declaration that the Appellee's motion to strike was rendered moot, or the Court's failure to strike the rehearing motion on its own initiative. Rather, one must consider the meaning behind a declaration of mootness within the context of the litigation. For example:

> A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an invervening event makes it impossible for the court to grant a party any effectual relief. 3 Fla.Jur.2d, Appellate Review, § 287, p. 337. Mootness can be raised by the appellate court on its own motion. DeHoff v. Imeson, 153 Fla. 553, 15 So.2d 258 (1943); Barrs v. Peacock, 65 Fla. 12, 61 So. 118 (1913).
>
> Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014, 1016 (Fla. 1st DCA 1985).

In this case the application of Rule 3.14(b) of the Florida appellate rules rendered the state's motion to strike moot. Obviously, the Court had reviewed the Songer rehearing and found no basis to invoke the exception to Rule 3.14(b) in Petitioner's case.

Because no exceptional basis existed, post-Songer, for allowing new issues to be raised and considered by motion for rehearing, the rule barred consideration of the Lockett issues and the state's motion to strike was rendered moot - relief was granted by the rule rather than by motion.

2. The Supplemental Brief

Four months and eight days after filing an initial brief on the merits and well after the time for filing a reply brief had passed, Petitioner raised two new claims via supplemental brief: (1) limited presentation of mitigating evidence by counsel and (2) lack of consideration of non-statutory mitigation by the trial court. (En Banc Brief of Petitioner, page 6). Petitioner now concedes this action was inappropriate under former Rule 3.7(d), Florida Appellate Rules (1962) and current Rule 9.210(a), Florida Rules of Appellate Procedure.

There are exceptions to these rules and they follow the general standard in Florida law for excusing a lack of objection at trial or a failure to raise an issue until the filing of a motion for rehearing: fundamental interests of

justice will excuse the procedural error. Petitioner cites to some of these cases. City of Miami v. Murphy, 137 So.2d 825 (Fla. 1962) is a classic example. By unauthorized supplemental brief the Appellant raised an issue alleging fundamental error not presented in the lower court. Because "at first glance the position of the Appellant appears both plausible and meritorious.", the Supreme Court reached the merits. Id. 827. Likewise, Jarrard v. Associates Discount Corporation, 99 So.2d 272 (Fla. 1957) involved a direct conflict between a 1952 Florida Supreme Court decision and the then-current rules of civil procedure. Id. at 276. Therefore, the Court allowed a supplemental brief to be filed and considered on the merits. Wolack v. State, 464 So.2d 587 (Fla. 4th DCA 1985) involved a supplemental brief on the then per se reversible issue of comments on the right to remain silent. Under former Florida law such comments were per se reversible error. See Willinsky v. State, 360 S.2d 760, (Fla. 1978). Morgano v. State, 439 So.2d 924, 926 (Fla. 2d 1983) involved a supplemental brief on the question of forcing a person to trial on criminal charges without his lawyer, a situation the Court noted was one of first impression in the State. The supplemental brief in Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) did not raise a new

issue. The supplemental brief in Parker v. State, 476 So.2d 134, 138 (Fla. 1985) raised the new rule of State v. Neil, 457 So.2d 481 (Fla. 1984) which effectively overturned Swan v. Alabama, 380 U.S. 202 (1965) as a matter of state law. The remaining cases fall within similar fundamental principles of justice parameters.

What is critical to this court's review of these types of cases is that the Florida Supreme Court mentions the supplemental brief and explains why the issue was so important to the administration of justice as to justify waiving the rule. Absent any similar discussion in Hargrave v. State, 366 So.2d 1 (Fla. 1978), it is clear the Florida court did not allow an exception to the rule prohibiting supplemental briefs. Furthermore, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984) is not helpful to Petitioner. While it is true the Florida Supreme Court will review the entire record, the only matter it is required to review independently of a proper brief on the merits is "...The evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." Florida Rule of Appellate Procedure 9.140(f). See also Florida Statute Section 921.141(4) (1972), and Sundell v. State, 354 So.2d 409 (Fla. 1978).

Lastly, Thomas v. State, 421 So.2d 160, 163 (Fla. 1982), cited by Petitioner in footnote 6 of his En Banc Brief, is not applicable. In an alternative ruling the Thomas opinion noted the filing of a supplemental brief as indicative of Appellate counsel's effectiveness. That holding fails to change the outcome concerning a defaulted direct appeal issue. Petitioner had an ineffectiveness of counsel claim pending in the district court but abandoned it on appeal. Therefore, Thomas is not dispositive. cf Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985). (State court rejection of ineffectiveness of Appellate counsel claim not equal to review on merits.)

3. The Post-Conviction Motion

Petitioner seeks to create a conflict between the panel decision and Campbell v. Wainwright, 738 F.2d 1573, 1576 (11th Cir. 1984). In the instant case no state trial court or appellate court ever reached the merits of the Lockett claims on direct appeal, motion for post-conviction relief in the trial court or appeal from the denial of the motion for post-conviction relief. Hargrave, 804 F.2d at 1188-89 N. 11 and 13. (See also the discussion therein on the appellate rule governing new issues on rehearing and filing of supplemental briefs, and the panel's recognition of Petitioner's failure to timely object at trial to the jury

instruction on mitigation). In contrast, Campbell involved a detailed order from the trial court discussing the issues raised by motion for post-conviction relief in somewhat vague terms, to wit:

> The Court further finds that all other issues asserted have been foreclosed by the appeal in this case, were judgment decisions of Petitioner's counsel, or are otherwise insufficient to justify the relief sought by movant.
>
> IT IS, THEREFORE, UPON CONSIDERATION THEREOF ORDERED AND ADJUDGED that the Motion to Vacate the Judgment and Sentence, bearing date of March 13, 1974, and any and all other similar motions or petitions filed heretofore by the Movant are hereby denied.
>
> Id. at 1577.

This order was affirmed without opinion. Campbell v. State, 338 So.2d 843 (Fla. 1st DCA 1976). With nothing else to work with this Court concluded:

> In affirming this order, the Florida appellate court provided no indication that it would not consider Campbell's allegations because he failed to raise them on appeal. Although the state argues that, in the part of the order stating that some issues were "foreclosed by the appeal," the judge applied a bar as to those issues that could have been raised on appeal, we do not find this

> phrase to be so clear. The court may have meant that the issues were correctly decided adversely to Campbell on appeal, and need not be discussed further. In any event, because of the alternative phrasing of the court's order, we cannot determine which issues the court may have considered to be "foreclosed." Given this situation, a federal court must address the merits.
>
> Campbell at 1577 (footnotes omitted).

In Hargrave v. State, 396 So.2d 1127 (Fla. 1981) the appellate court provided a sufficient basis for determining the application of a procedural bar to the Lockett claims. First, the Court noted:

> The 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process.

Then in a footnote it showed how it had recently applied a procedural default analysis to Petitioner's presentation of direct appeal issues by writ of habeas corpus in Hargrave v. State, 388 So.2d 1021 (Fla. 1980). Lastly, the Court held the trial court was correct in ruling the issues, "...Either were or could have been raised on direct appeal or they involve changes in decisional law not congnizable in a 3.850 motion." Hargrave, 396 So.2d 1127-28. Five State

Supreme Court cases followed that sentence. A review of those cases demonstrates conclusively that a procedural default on all Lockett claims was found in the state court.

Adams v. State, 380 So.2d 423 (Fla. 1980) applied procedural bar to issues of prosecutorial misconduct and lack of a proffer of mitigating evidence at the original trial. The Court addressed the merits of a claim of ineffectiveness of counsel at sentencing and the merits of an eighth amendment challenge to the arbitrary and capricious imposition of the death penalty based on the imposition of the penalty in four cases over a four year period in the country. However it did not address Lockett claims.

Sullivan v. State, 372 So.2d 938 (Fla. 1979) discussed allegations of ineffective assistance of counsel. Again, it did not discuss Lockett.

Spenkelink v. State, 350 So.2d 85 (Fla. 1977) discussed a collateral attack issue, the assertion that potential jurors were excluded from the panel, and held the claim was one for direct appeal and barred under Wainwright v. Sykes, 433 U.S. 72 (1977). The Court also found Wainwright barred review of an issue involving the Defendant's confession. Again, no Lockett claims were involved.

State v. Matera, 266 So.2d 661 (Fla. 1972) involved allegations of perjury raised for the first time on collateral attack. Again the keystone of the opinion was a determination that issues known at the time of direct appeal could not be ignored and later raised by collateral attack. Sentencing was not discussed.

Sentencing was discussed however in the final case cited by the Court. Witt v. State, 387 So.2d 922 (Fla. 1980) cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612:

> By this appeal Witt raises essentially six issues, all of which he admits either were raised in the direct appeal from his conviction and sentence, or could have been raised at that time. He predicates his appeal on alleged changes in case law since his first appeal was concluded, asserting the right to obtain the benefits of subsequent, favorable case law developments relating to capital punishment and to criminal law generally. The particular changes which Witt presents for our consideration are these:
>
> * * *
>
> (5) an alleged change in the law, reflected by an aggregation of the individual opinions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), requiring that the state, before imposing

> the death penalty, establish that the defendant intended to kill the victim;
>
> Id. at 924.

This particular aspect of Lockett is not relevant to Petitioner's case. What is relevant is the detailed and articulate discussion of the tension between "ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in the individual cases on the other..." Id. at 925. Ultimately, the Witt opinion concluded that only major changes in constitutional law will be cognizable under Rule 3.850,and that the Defendant's Lockett claim did not present a change in law. Id. at 929-30. This leads to the inescapable conclusion that the Florida Supreme Court never reviewed the merits of the Lockett claim on appeal from the denial of Petitioner's motion for collateral attack.

Petitioner's argument in footnote 13 of his En Banc Brief does not properly explain the problem. First, the Florida Supreme Court has recently declared that Harvard v. State, 486 So.2d 537 (Fla. 1986) does not reflect a fundamental change in law. Aldridge v. State, 12 FLW 129 (Fla. March 12, 1987) (holding failure to raise Lockett claim on direct appeal barred it on collateral attack. Court noted Harvard was factually unique). The same is true of the facts in

Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc):

> The fact that the Florida Supreme Court has now held that neither the wording of the Florida Statute nor its prior decisions precluded the introduction of non-statutory mitigating evidence, Songer v. State, 463 So.2d 229 (Fla. 1985), relying on Songer v. State, 365 So.2d 696 (Fla. 1978), is not controlling in the instant matter. That court has recognized that the law could have been so "misconstrued." See Perry v. State, 395 So.2d 170, 174 (Fla. 1981). The critical and dispositive fact here is that the state trial judge did misinterpret the law and thus failed to consider any nonstatutory mitigation at the time of imposing the sentence of death. Although that sentence was vacated, Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977), due to a Gardner violation, upon resentencing the state trial judge limited petitioner to reviewing and rebutting the presentence investigation report. Consequently, it is clear that the state sentencing judge refused to give any consideration to non-statutory mitigating evidence at either the first or second sentencing proceedings. The interests of justice require that this be corrected.

In the present case, unlike Songer, the interests of justice were not violated because, as will shortly be demonstrated, the trial court here did not limit either the introduction or consideration of non-statutory mitigating evidence.

B. THE PETITIONER HAS NOT DEMONSTRATED CAUSE OR PREJUDICE SO AS TO AVOID HIS STATE PROCEDURAL DEFAULT

1. CAUSE

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) rehearing pending, limited on other grounds, Harich v. Wainwright, No. 86-3167,(11th Cir. March 18, 1987), this Court held:

> Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from, such failure. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110, 102 S.Ct. 1558, 1562, 71 L.Ed.2d 783 (1982). A significant change in applicable law, however, can both excuse the failure to raise a claim in a previous petition, Witt, 755, F.2d at 1397, and establish cause to excuse procedural default in state court. Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984).
>
> Id. at 1530.[3]

[3]The other method of establishing cause to avoid default is to prove appellate counsel was ineffective. For a discussion of this situation see Cartee v. Nix, 803 F.2d 296, 299-302 (7th Cir. 1986) (discussing failure to raise jury instruction issue not preserved by objection at trial and rejecting claim of ineffectiveness).

Adams goes on to describe how a major change in law that was not reasonably available prior to the new decision can establish cause. Id. at 1530-31. Footnote 5 of this opinion explains why the Court found the particular issue not available prior to a recent United States Supreme Court pronouncement.

Adams neither controls here nor conflicts with the panel's decision. The panel opinion, subsection II(c), accurately states the controlling Supreme Court precedent, properly enunciates the type of claim raised by Petitioner, and correctly concludes "clearly, there was a reasonable basis in 1975 upon which Petitioner could have made the constitutional challenge he wishes to make today." Hargrave, 804 F.2d 1190. In addition to the panel's discussion of the matter, one can look to any number of United States Supreme Court decisions as a providing reasonable basis upon which Lockett type claims could have been raised. For example in the 1937 decision, Pennsylvania ex. rel Sullivan v. Ashe, 302 U.S. 51, 82 L.Ed. 43 (1933), it was held:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities

> of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.
>
> Id. 302 U.S. 55.

Compare, California v. Brown, 479 U.S.___, 107 S.Ct. ___, 93 L.Ed.2d 934, 942 (1987) (O'Conner J. concurring) ("this emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence); Woodson v. North Carolina, 428 U.S. 280, 295-96 (1976); and McGautha v. California, 402 U.S. 183, 201-207 (1971) (discussing past efforts at solving the parameters for jury involvement in capital sentencing, including the model penal code §210(6) [proposed official draft, 1962]).

Therefore, unlike the situation addressed in footnote 5 of Adams, supra, this case rests in the percolating waters of evolving legal theory. "Under these circumstances, it simply is not open to argue that the legal basis of the claim Petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal." Smith v. Murray, 477 U.S. __ , 91 L.Ed.2d 434, 446 (1986).

Petitioner's analysis stresses the line of cases holding that appellate lawyers who failed to raise this type of claim were not ineffective due to a belief that mitigating circumstances were properly limited by the state. Hitchcock v. Wainwright, 770 F.2d 1514, 1516--17 (11th Cir. 1985) (en banc) cert. granted, U.S.__, 106 S.Ct. 2888 (1986). Petitioner raised appellate counsel's ineffectiveness in the district court. However, he limited his grounds to reviewing counsel's failure to raise issues concerning post-arrest statements and prosecutorial misconduct. Now, for the first time, Petitioner suggests he can borrow portions of the law on ineffectiveness, detailing when a claim is "available" to a lawyer, and plug those rulings into a "cause" analysis. These are mutually exclusive considerations and the Court should recognize that cases such as Hitchcock, reviewing "availability" as it relates to a lawyer's duty to advance his client's most promising arguments on appeal, are not applicable to resolving the inquiry raised in Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) and latter explained in more detail in Murray v. Carrier, 477 U.S. ___, 106 S.Ct. ___, 91 L .Ed.2d 397 (1986):

> We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see Reed v. Ross, 468 US, at 16, 82 L.Ed.2d 1, 104 S.Ct. 2901, or that "some interference by officials," Brown v. Allen, 344 US 443, 486, 97 L.Ed. 469, 73 S.Ct. 397 (1953), made compliance impracticable, would constitute cause under this standard.
>
> Id. at 91 L.Ed. 408.

* * *

AND:

> Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine which is "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings," Rose v. Lunday, 455 US 509, 518, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.
>
> Id. at 409.

Petitioner has ignored the line of demarcation between "cause" analysis and "ineffectiveness of counsel" analysis in an attempt to create a hybrid: "cause" built on a series of cases holding counsel was not ineffective for failing to raise the claim now said to be procedurally defaulted. Accepting of this theory would result in a dilution of the current rulings of the United States Supreme Court indicating that the present test for cause and prejudice is a "sound and workable means of channelling the discretion of federal habeas courts." Id. at 414.

2. PREJUDICE

The district court found no actual prejudice was established by the Petitioner on any aspect of the

Lockett claims. There was no limiting instruction by the Court. No limitation in the introduction of non-statutory mitigation such as Petitioner's steady employment, below average intelligence, use of drugs and sociopathic personality, (Order of the District Court, pages 9-10),[4] and no limitation on counsel's arguments to the jury regarding these non-statutory factors. The district court went on to note that the sentencing judge did discuss and consider the non-statutory mitigation in his order.

The identical argument presented herein was made and rejected by this Court in Alvord v. Wainwright, 725 F.2d at 1299. Therein, this Court, speaking through Judge Hill, observed:

> In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the 'sentencer (must) not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death.' (cite omitted). Alvord contends that the jury

[4]As footnoted by the district judge, the Petitioner conceded this evidence was elicited during testimony that also dwelt on statutory mitigation.

instructions at the sentencing hearing violated the Lockett rule by limiting the jury to considering only statutory mitigating circumstances. See Washington v. Watkins, 655 F.2d 1346, 1377 (5th Cir. Unit A 1981) (invalidating sentence on basis of faulty instructions), cert. denied 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The district court correctly analyzed and resolved this issue.

The judge instructed the jury in this case that the 'aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence...' and then listed the statutory aggravating circumstances. The judge then instructed the jury that the 'mitigating circumstances which he may consider if established by the evidence are these...' and then listed the statutory mitigating circumstances. In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc),

> Instructing the jury on aggravating circumstances, stated, 'You shall consider only the following...,' and read the statutory language. With regard to mitigating circumstances, he said, 'You shall consider the following...,' omitting the word 'only' and again reading the appropriate statutory language.
> (cite omitted).

We see no distinction of importance between the language used in Ford

> and that used in the present case. In neither situation did the trial judge commit the error present in Washington v. Watkins, in which the charge 'operated affirmatively on preclude jury consideration of non-statutory mitigating factors.' (cite omitted). Also, in both this case and Ford's the judge permitted the defendant freely to introduce evidence without regard to its statutory relevance. Plus, the sentence is not invalid under Lockett.
>
> 725 F.2d at 1299.

Similar results are found in Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985) (refusing to issue writ where district court had denied relief on basis of state court records showing that former Florida law had little, if any, effect on sentencing); Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985) (lack of objection at trial to similar instruction and lack of proof trial court limited his review of proffered non-statutory mitigation justified affirmance of sentence); Francois v. Wainwright, 763 F.2d 1188, 1190-91 (11th Cir. 1985); Johnson v. Wainwright, 806 F.2d 1479, 1484 (11th Cir. 1986) (trial judge allowed jury to hear non-statutory mitigation and later noted that he had not disregarded any mitigating evidence offered at trial or penalty phase); Dobbert v. Strickland, 718 F.2d 1518, 1524

(11th Cir. 1983); Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983) and Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983.[5]

Petitioner's assertion that the actions of his counsel limited the presentation of non-statutory mitigating evidence, and that the trial court and State Supreme Court ignored the non-statutory mitigating evidence provided during trial, is wholly erroneous. First, the transcript indicates trial counsel vigorously argued for a pre-sentence investigation report by stating "I just feel that every possibility, no matter how remote, must be explored." (S.T. 1087-1088). Second, defense counsel presented witnesses who concededly provided evidence of non-statutory mitigating circumstances and argued these matters to the jury. (Opinion of the district court page 10, footnote 2.). Third, the trial court considered the non-statutory mitigation factors of Petitioner's employment, intelligence and personality flaws in its sentencing order. Lastly, the Florida Supreme Court would have reviewed the non-statutory

[5] These last three cases are discussed in detail in Respondent's original brief in this case at pages 28-31. These arguments are adopted and reasserted by Respondent at this time.

mitigating evidence in the context of a properly presented issue. At first blush the opinion is not totally clear on this point, and Justice Hatchett's dissent, 366 So.2d at 6, raises serious concern about how the Court was generally interpreting the law:

> The position taken by the majority, in its reliance on Thompson, suggesting that there is no sentencing discretion left in the trial judge raises serious questions concerning the constitutionality of our present statute.
>
> Id. at 7.

However, as discussed supra, any concerns about Lockett's impact on Florida's statute were confronted in the rehearing of Songer v. State:

> We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in Washington v. State, 362 So.2d 658 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others. Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute

> merely indicate the principal factors to be considered. This construction of the statute, and its continued validity, were noted most recently in Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), where the court was presented with an identical challenge to our death penalty statute based on Lockett v. Ohio.
>
> Id. at 700

The later denial, without opinion, of Petitioner's unauthorized rehearing petition and supplemental briefs cannot be viewed outside the context of Songer. Had there been a problem with how the Court treated the instant case post-Songer, one would assume previous notes of dissent would have been restated. But recall, Petitioner in fact waived these issues, and absent fundamental concerns he was not entitled to have the State Supreme Court review the merits beyond the parameters of the trial court's order sentencing Petitioner to death.

C. THE PROFFERED MITIGATION

Petitioner claims he was denied the opportunity to present additional mitigation for consideration prior to sentencing. This is refuted by trial counsel's arguments to the Court and the testimony of Petitioner's mother and an expert witness, Dr. Sylvester. (S.T. 998). These witnesses did divulge significant non-statutory mitigation. (Order of

the district court, footnote 2).

Evidence of Petitioner's background and history, including allegations of abuse by his father (En Banc Brief of Petitioner, page 32, footnote 26) would have contradicted the testimony of Petitioner's mother that she and the father tried to give their son a good home and raise him properly. (S.T. 1097-98). Thus, regardless of its impact, it cannot be said that presentation of this additional evidence would have affected the sentencing decision of the Court or the recommendation of the jury. See Thomas v. Wainwright, 767 F.2d at 746-747, discussing the strategic need for consistency in presenting mitigating evidence.

Furthermore, even assuming the evidence would not be too inconsistent to present in a sentencing hearing, it would be only cumulative to the detailed testimony of Dr. Sylvester, which revealed Petitioner as a man with a dull-normal intelligence quota and a mental age of sixteen or seventeen. (Petitioner was nineteen at the time). (S.T. 990-91, 1004). The doctor found documented evidence suggesting brain damage affecting the thinking process, possibly from extensive drug use. (S.T. 992-93). The doctor also told the jury he found:

> Morbid preocupation with material which suggested a good deal of insecurity, apprehension, fear and of course the consequent rebellion against this is striking back of not knowing just what is wrong with him. (S.T. 993)

In light of Petitioner's current emphasis on Eddings v. Oklahoma, supra, in this context it should be clear that any further evidence of non-statutory mitigation would have been cumulative and not sufficient to affect the outcome. Thompson v. Wainwright, 787 F.2d 1447, 1457 (11th Cir. 1986).

Lastly, trial counsel forcefully argued non-statutory mitigation to the jury. Characterizing his client as a "defective child" (S.T. 1066) who should not be treated to "spartan tactics" and left to die on an "electrically charged plain." (S.T. 1066-67). Counsel went over the findings of Dr. Sylvester and Dr. Corwin, and asked the jury to think carefully about whether "we are dealing with a person who is the kind of person the legislature had in mind..." for capital punishment. (S.T. 1069-1073).

This argument is identical to the type of argument approved by this Court in Harich v. Wainwright, supra, wherein the Court rejected both a request for an evidentiary hearing and a finding of prejudice on the record:

Counsel offered evidence showing that Harich was a good worker and a model prisoner. Dr. McMahon testified that the attack was an isolated "explosion" and that such an outburst was unlikely to happen again. Finally, counsel's closing argument was passionate and convincing. Counsel forcefully contested each of the proposed aggravating circumstances and defended each of the proposed mitigating circumstances. He pointed out that Harich was a young, first offender who was operating under extreme emotional disturbance at the time of the murder.

We agree with the district court and with the Florida Supreme Court that the failure to present additional mitigating evidence, even if the result of counsel's neglect, does not undermine our confidence in the outcome of the sentencing proceeding.

* * *

Counsel, in his closing argument, described Harich's personal life, reviewed the aggravating and mitigating circumstances, and argued eloquently for leniency. Thus, since Harich has made an insufficient showing of prejudice, there is no need to remand for an evidentiary hearing with respect to this issue.

(slip opinion, page 20-21)
(citations and footnote omitted).

A similar result, if the Court reaches beyond the procedural bar and cause requirement, should occur here - either as to the "prejudice" aspect of the bar, or on the merits of the claim that additional evidence would have affected the jury or judge in their respective decisions.

D. THE IMPACT OF THE INSTRUCTIONS

The last portion of this first issue is covered supra in the discussion on the cause and prejudice standard.

Recall that no objection was raised to any of the jury instruction pre, or post, verdict in regard to what was proper mitigation. Furthermore the district court did cite Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) cert. denied, 464 U.S. 865 (1983), which is the controlling precedent in this matter. As recently noted in California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 940 the entire context of the instruction is revieved only when the particular instruction fails constitutional muster. The instruction on mitigating evidence given during the sentencing phase must be looked at from the perspective of a reasonable juror who had been presented non-statutory mitigating evidence and related argument from defense counsel just prior to making his decision. Like the situation in Brown, the instant case fails to violate the

Lockett standard. Unlike Lucas v. State, 490 So.2d 943 (Fla. 1986) the trial court never specifically precluded the consideration of non-statutory mitigation by instruction to the jury. The burden is upon Petitioner to show this instruction appreciably affected his sentence. Given the detailed record in this case it is certain that he has failed to do so. The district court and the panel of this Court were correct in denying Petitioner any relief.

II

SECTION 921.141 (5)(h), FLORIDA STATUTES (1975), WHICH ESTABLISHES AS A POTENTIAL AGGRAVATING CIRCUMSTANCE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED IN THIS CASE BY THE STATE TRIAL COURT AND THE SUPREME COURT OF FLORIDA.

In his motion for rehearing Petitioner did not challenge this Court's ruling on the constitutionality of the "heinous, atrocious, or cruel" aggravating circumstance as applied to the facts of this case. Respondent therefor respectfully submits that further review is unwarranted, and that the segment of the opinion relating to this issue should be reinstated.

In any event, this Court's prior determination was unquestionably correct. As this Court noted in its opinion, the Florida Supreme Court has developed a precise and limited standard for applying this aggravating circumstance:

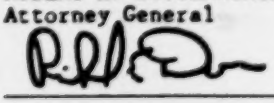
the murder must be accompanied by such additional torturous acts as to set the crime apart from the norm. Proffit v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1983), cert. denied, 464 U.S. 1002 (1983). Where the victim is initially rendered helpless or incapacitated, as by wounding or binding, and then subsequently executed, this aggravating factor is appropriate. In addition to the cases cited by this Court in its opinion, Respondent would cite Phillips v. State, 476 So.2d 194 (Fla. 1985), where the victim was shot twice in the chest, then finished off with two shots to the head after the Defendant reloaded, Squires v. State, 450 So.2d 208 (Fla. 1984), where the victim was wounded by a shotgun blast and then killed by additional shots from a revolver, Troedel v. State, 462 So.2d 392 (Fla. 1984), where the victim survived initial head wound but succombed following second head shot, and Henderson v. State, 463 So.2d 196 (Fla. 1985), where the victim was bound, gagged and shot execution style. In the instant case the victim was shot twice and left helpless while Petitioner consumated the robbery, eventually returning to pump a final fatal round into the victim's skull. Given these facts, this aggravating factor was clearly established.

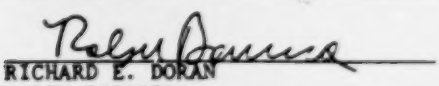
CONCLUSION

Based on the foregoing authorities and arguments presented, Respondent would urge this Court to affirm the denial of Hargrave's petition for writ of habeas corpus and reinstate the panel opinion.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General





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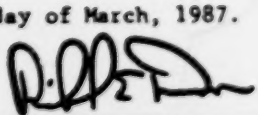
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing EN BANC BRIEF OF RESPONDENT-APPELLEE was furnished by mail to ELLIOT H. SCHERKER AND KAREN N. GOTTLIEB, Assistant Public Defenders, 1351 N. W. 12th Street, Miami, Florida 33125, on this 27TH day of March, 1987.



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